SUCCESSION AND POSTHUMOUSLY CONCEIVED CHILDREN

REPORT FOR DISCUSSION 23

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Invitation to Comment

Deadline for comments on the issues raised in this document is June 30, 2012

Advances in artificial reproductive technologies have significantly increased the incidence of the use of these technologies. In addition, the ability to store genetic material for longer periods of time has led to the possibility of the genetic material being used for reproductive purposes after the death of the person who provided the genetic material.

The law has addressed, and to some extent dealt with the legal issues raised by assisted reproduction, and many jurisdictions have new rules relating to parentage or succession rights. In Alberta, as in many other jurisdictions, the law has not yet addressed how to deal with relationships or rights which are created after the death of the donor of genetic material. Who is a parent? Has the deceased consented to posthumous use of the material? Should the child automatically have a relationship and inheritance rights from the deceased donor?

The purpose of this report is to raise some of these issues, describe the legal concepts which are at play and ask whether the law ought to propose solutions to these issues. We do not propose or recommend any particular solutions. We encourage your comments and feedback and hope that we will be assisted in determining whether or not changes in the law ought to be made to address the issues arising from posthumous reproduction. This is a new and challenging area and your assistance in helping clarify the issues and evaluate possible solutions will be very helpful to the Institute.

In order to provide for a comprehensive and efficient review of the feedback, we would like to receive any comments no later than June 30, 2012.

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Alberta Law Reform Institute

The Alberta Law Reform Institute was established on January 1, 1968 by the Government of Alberta, the University of Alberta and the Law Society of Alberta for the purposes, among others, of conducting legal research and recommending reforms in the law. Funding for ALRI's operations is provided by the Government of Alberta, the University of Alberta and the Alberta Law Foundation.

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Acknowledgments

This report is designed to inform readers of the issues and to encourage debate about the legal policies which should be developed.

It has had the benefit of review and discussion by the Institute Board and the careful scrutiny and editorial advice of our Research Manager, Sandra Petersson.

We specifically acknowledge the work of our Counsel, Elizabeth Robertson, to whom fell the task of pulling together the research and articulating the issues. Her depth of knowledge and clear writing is evident in this report. She was ably assisted in the areas of document style, formatting and footnoting by Ilze Hobin.

We thank these individuals in particular for their work in producing this report. We look forward to your feedback on this important and emerging topic.

Summary

The use of artificial reproductive technologies [ART] makes possible the conception and subsequent birth of a child following the death of either one or both of its genetic parents. This report discusses the position of posthumously conceived children under the law of succession in Alberta and outlines some possible options for reform.

The current law, Alberta's *Family Law Act*, has a scheme for determining parentage of a child born by way of artificial reproduction. Parentage then determines what rights the child has with respect to parents, including inheritance from them. However, it is unlikely that parentage can be established for posthumously conceived children, and therefore the link for inheritance purposes is missing. Even if parentage could be established, the fact that reproduction occurs sometime after the death of one of the parents brings in other factors affecting whether and how inheritance rights on intestacy might be created. These issues include: the orderly administration of estates; the interests of other intestate heirs; the best interests of the child. The decision whether or not to grant inheritance rights requires placing some values ahead of others. And in all of the debates, there is an ongoing concern that the deceased had consented, while alive, to parentage and inheritance rights operating after their death.

Similar issues arise with respect to wills, although it may be possible for a testator to make a gift to a posthumously conceived child if the drafting is carefully carried out. The provisions of the *Wills and Succession Act*, rules relating to perpetuities and class closing, necessitate very careful wording of any gift to a posthumously conceived child.

Issues such as parentage, inheritance rights or matters of family maintenance and support which are resolved for the child born during the lifetime of the parents, are in considerable doubt for the posthumously conceived child. The topic of this report is how or if those doubts might be resolved.

Issues

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Should parentage for posthumously conceived children be clarified under the *Family Law Act*? 52

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Table of Abbreviations

LEGISLATION

AHRA	*Assisted Human Reproduction Act*, SC 2004, c 2
British Columbia Act	*Family Law Act*, SBC 2011, c. 25 (not yet in force)
FLA	*Family Law Act*, SA 2003, c F-4.5
WSA	*Wills and Succession Act*, SA 2010, c W-12.2

LAW REFORM PUBLICATIONS

Alberta Report	Alberta Law Reform Institute, *Wills and the Legal Effects of Changed Circumstances*, Final Report 98 (2010)
British Columbia White Paper	British Columbia, Ministry of Attorney General, *White Paper on Family Relations Act Reform: Proposals for a New Family Law Act* (2010)
Manitoba Report	Manitoba Law Reform Commission, *Posthumously Conceived Children: Intestate Succession and Dependants Relief: The Intestate Succession Act: Sections 1(3), 6(1), 4(5), 4(6) and 5*, Report 118 (2008)
Nova Scotia Report	Law Reform Commission of Nova Scotia, *The Rule Against Perpetuities*, Final Report (2010)
ULCC Report	Uniform Law Conference of Canada, *Proceedings of the Ninety-first Annual Meeting* (Ottawa: Ont 2009) Appendix B, "Assisted Human Reproduction, Report of the Joint ULCC-CCSO Working Group"

SECONDARY SOURCES

Feeney	J MacKenzie, ed, *Feeney's Canadian Law of Wills*, 4th ed, looseleaf (Markham, Ont: Butterworths Canada, 2000)
Knaplund 2004	Kristine S Knaplund, "Postmortem Conception and a Father's Last Will" (2004) 46:1 Ariz L Rev 91

Knaplund 2008	Kristine S Knaplund, "Legal Issues of Maternity and Inheritance for the Biotech Child of the 21st Century" (2008-2009) 43:3 Real Prop Tr Est LJ 393
VanCannon	Kayla VanCannon, "Fathering a Child from the Grave: What are the Inheritance Rights of Children Born Through New Technology after the Death of a Parent?" (2003-2004) 52 Drake L Rev 331

CHAPTER 1

Posthumously Conceived Children

A. Introduction

[1] The development of techniques for freezing sperm, eggs and *in vitro* embryos for future use has resulted in the possibility of children being born after the death of either one or both of their genetic parents.[1] The rapid advances in technology have led to a situation under the law that one author has described as the "reproductive wild west."[2] To date, the law in Alberta has not responded to the challenges presented by posthumously conceived children and the status of these children raises many difficult questions.

[2] As stated in *Woodward v Commissioner of Social Security*:[3]

> As these technologies advance, the number of children they produce will continue to multiply. So, too, will the complex moral, legal, social, and ethical questions that surround their birth. The questions present in this case cry out for lengthy, careful examination outside the adversary process, which can only address the specific circumstances of each controversy that presents itself. They demand a comprehensive response reflecting the considered will of the people.

[3] This Report for Discussion examines the position of posthumously conceived children under the law of succession. Much of the law governing succession was enacted long before artificial reproductive technologies [ART] made conceiving a child after the death of a parent a reality. Whether a posthumously conceived child should have inheritance rights from or through the deceased parent raises some of the thorniest issues in inheritance law today. Under the common law, inheritance is focused on family relationships and the transfer of property. The posthumously conceived child "sits, poised in an uneasy balance, between

---

[1] In the vast majority of cases, it appears that the use of artificial reproductive technologies to conceive a posthumous child occurs after the father has died. However, a posthumously conceived child of a deceased mother could be born using a surrogate.

[2] Margaret Ward Scott, "A Look at the Rights and Entitlements of Posthumously Conceived Children: No Surefire Way to Tame the Reproductive Wild West" (2003) 52:2 Emory LJ 963 at 964.

[3] *Woodward v Commissioner of Social Security*, 760 NE (2d) 257, 17 ALR 6th 851 at 870 (Mass 2002).

the two central poles of inheritance concerns: the distribution of property and the relatedness of individuals."[4] Alberta recently enacted new legislation on succession, the *Wills and Succession Act* [WSA].[5] The discussion in this report focuses on the position of posthumously conceived children under the new legislation.

[4] While this report focuses on succession, it is important to be cognizant of the broader issue. Should the posthumously conceived child be treated as if the child had been born during the lifetime of the deceased parent for any purpose flowing from the connection with the deceased? Should the posthumously conceived child be entitled to support or social benefits which may result from the death of the parent, even though the child may be born a number of years after the death? If no, is there any principled reason to treat succession differently?

B. Issues for Discussion

[5] The issues identified below outline how the posthumously conceived child is presently unrecognized under the law governing parentage and succession in Alberta. The questions ask whether the law should be changed to give the posthumously conceived child parentage and inheritance rights in respect of the deceased parent.

Should parentage for posthumously conceived children be clarified under the *Family Law Act*?

[6] It is not clear whether parentage can be established for the posthumously conceived child under the *Family Law Act* [FLA].[6] In order to inherit from a parent, legal parentage for the child must be established. Parentage is also very important for the child in many other areas. Should the law be changed to clarify the status of these children?

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[4] Rosalind Atherton, "*En ventre sa frigidaire*: posthumous children in the succession context" (1999) 19:2 Legal Studies 139 at 143.

[5] *Wills and Succession Act*, SA 2010, c. W-12.2 [WSA].

[6] Donors of human reproductive material who do not intend to use the material for their own reproductive use are not by reason only of the donation parents of a child born as a result. *Family Law Act*, SA 2003, c F-4.5, s 7(4) [FLA].

Should the posthumously conceived child inherit from or through the deceased parent on intestacy?

[7] Under the current law in Alberta, a posthumously conceived child will not inherit from a deceased parent or through a deceased parent on intestacy. Is this a fair outcome for these children? If it is decided that the child should be given inheritance rights, what safeguards might be put in place to ensure the orderly administration of estates?

Should the posthumously conceived child be able to inherit under a will?

[8] Under the WSA, section 28, a testator may make a bequest to a posthumously conceived child with appropriate drafting. Should a posthumously conceived child ever be able to inherit under a will? Is the potential for administrative complexity and delay so great that these children should never be able to inherit? If they are able to take a gift under a will, how should the law deal with the establishment of testamentary intention and the administration of estates?

Should the posthumously conceived child be eligible for family maintenance and support?

[9] A posthumously conceived child will likely not be eligible for family maintenance and support under the WSA due to the definition of family member in section 72. Should the law be changed to allow the child to apply for such assistance?

C. Use of Artificial Reproductive Technologies

[10] The possibility of producing human beings by artificial means has a long history. The first report of human artificial insemination was in England in 1770. Since 1949, it has been possible to freeze sperm for later use.[7] The first live birth as a result of *in vitro* fertilization occurred in England in 1978.[8]

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[7] Joshua Greenfield, "Dad was Born a Thousand Years Ago? An Examination of Post-Mortem Conception and Inheritance, With a Focus on the Rule Against Perpetuities", Note, (2007) 8:1 Minn J L Sci & Tech 277 at 280-281 [Greenfield].

[8] Emily McAllister, "Defining the Parent-Child Relationship in an Age of Reproductive Technology: Implications for Inheritance" (1994-1995) 29:1 Real Prop Prob & Tr J 55 at 60.

[11] ART includes *in vitro* fertilization and artificial insemination.[9] With respect to artificial insemination, it is difficult to estimate how often the procedure is performed due to the lack of reporting requirements. One estimate is that between 4 and 15 times more children are born as a result of artificial insemination as opposed to *in vitro* fertilization.[10] The use of *in vitro* fertilization has nearly doubled in the US between 1999 and 2008. In the United States, 61,426 babies were born in 2008 as a result of *in vitro* fertilization.[11]

[12] The use of *in vitro* fertilization is increasing in Canada.[12] The increased use of ART may be due to a number of factors including the trend to have families later in life, smaller numbers of children available for adoption and the decreasing cost of treatment.[13] In 2009, there were 16,315 *in vitro* fertilization treatment cycles performed in Canada and 5,710 infants born alive.[14] In 2008, babies born after *in vitro* fertilisation represented over 1% of all live births in Canada.[15] In addition, there are many children born through artificial insemination.

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[9] See the Appendix for further information on the various technologies.

[10] Uniform Law Conference of Canada, *Proceedings of the Ninety-first Annual Meeting* (Ottawa: Ont 2009) Appendix B, "Assisted Human Reproduction, Report of the Joint ULCC-CCSO Working Group" at 3, online: <http:www.ulcc.ca/en/poam2> (see 2009, Civil Section Documents) [ULCC Report].

[11] Centers for Disease Control and Prevention, American Society for Reproductive Medicine, Society for Assisted Reproductive Technology. *2008 Assisted Reproductive Technology Success Rates: National Summary and Fertility Clinic Reports* (Atlanta: US Department of Health and Human Services, 2010) at 65.

[12] ART treatment cycles performed in Canada increased by 10.7% from 2006 to 2007. ULCC Report at 3.

[13] ULCC Report at 2. Coverage may be available under provincial health plans in the future. Quebec has been providing coverage for ART treatments since August 2010. See: McGill University Health Centre, "Government of Quebec funding for assisted reproduction begins," online: <http://muhc.ca/homepage/article/government-quebec-funding-assisted-reproduction-begins>.

[14] Canadian Fertility and Andrology Society, "Canadian ART Register Annual Report: 2009" online: <www.cfas.ca>.

[15] In 2008, 5104 infants were born as a result of *in vitro* fertilization. "Canadian ART Register Annual Report: 2008" online: <www.cfas.ca>. There were 377,886 live births in Canada in 2008. Statistics Canada, "Births and total fertility rate, by province and territory", online: <http://www40.statcan.ca/l01/cst01/hlth85a-eng.htm>.

D. Children Born after a Parent's Death

[13] Individuals may choose to store reproductive material for a number of reasons. Some infertile couples who undergo *in vitro* fertilization freeze any surplus embryos in the hope of having more children in the future. Other individuals may choose to freeze sperm, eggs or embryos in order to postpone childbearing. Individuals with medical conditions, such as cancer, may bank reproductive material because they may be infertile after treatment.[16] Military personnel may store reproductive material before serving in a war zone due to the risk of death or infertility from injuries.[17]

[14] As it is a private matter, it is impossible to determine the numbers of children conceived posthumously through ART. The first known media report of a posthumously conceived child was in 1977. Other media reports surface on an occasional basis.[18] It appears that the numbers of posthumous births are increasing in the US partly because greater numbers of soldiers are storing their sperm or their widows are harvesting sperm from their newly deceased spouses.[19] The volume of requests for access to post-mortem reproductive materials in the US is escalating and the American Society for Reproductive Medicine has issued guidelines on post-mortem retrieval of human reproductive material.[20]

[15] The most likely reason for having a child after your partner has died is the idea that the child will be a tribute and a link to the deceased person. One woman stated that the [illegible]sion of her fiancé to bank sperm before going to Iraq was based on "[illegible]ing a reminder of him, having another person carry his name, his being."[21] As well, there may be a sense of moral obligation to use any existing embryos after the death of a spouse

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[16] Kristine S Knaplund, "Legal Issues of Maternity and Inheritance for the Biotech Child of the 21st Century" (2008-2009) 43:3 Real Prop Tr Est LJ 393 at 396 [Knaplund 2008].

[17] Kristine S Knaplund, "Postmortem Conception and a Father's Last Will" (2004) 46:1 Ariz L Rev 91 at 91 [Knaplund 2004].

[18] Knaplund 2004 at 92, nn 8-9.

[19] Kimberly E Naguit, "The Inadequacies of Missouri Intestacy Law: Addressing the Rights of Posthumously Conceived Children" (2009) 74:3 Mo L Rev 889 at 889.

[20] Jason D Hans, "Attitudes Toward Posthumous Harvesting and Reproduction" (2008) 32:9 Death Studies 837 at 839; Knaplund 2004 at 94, 96.

[21] Kayla VanCannon, "Fathering a Child from the Grave: What are the Inheritance Rights of Children Born Through New Technology After the Death of a Parent?" (2003-2004) 52 Drake L Rev 331 at 361 [VanCannon].

or partner. In some jurisdictions, financial incentives may exist as a child may possibly inherit from the deceased's estate or be entitled to state benefits.[22]

[22] This is currently the case in some US states. Knaplund 2008 at 399-400.

CHAPTER 2

The Current Law in Alberta

A. *Assisted Human Reproduction Act*

[16] The federal *Assisted Human Reproduction Act* [AHRA] provides that written consent must be given for the use of human reproductive material.[23]

> 8(1) No person shall make use of human reproductive material for the purpose of creating an embryo unless the donor of the material has given written consent, in accordance with the regulations, to its use for that purpose.
>
> (2) No person shall remove human reproductive material from a donor's body after the donor's death for the purpose of creating an embryo unless the donor of the material has given written consent, in accordance with the regulations, to its removal for that purpose.
>
> (3) No person shall make use of an *in vitro* embryo for any purpose unless the donor has given written consent, in accordance with the regulations, to its use for that purpose.

[17] The regulations in respect of the section provide that written consent to the use of the material must have been given before its use. The donor may consent to use of the reproductive material for a number of purposes. Consent may only be withdrawn in writing and the person intending to make use of the material must be notified of the withdrawal of the consent before the reproductive material is used. Sections 3 and 4 provide that the donor must give consent for the donor's spouse or

---

[23] *Assisted Human Reproduction Act*, SC 2004, c 2, s 8 [AHRA]. In s 3 a "donor" is defined as "(a) in relation to human reproductive material, the individual from whose body it was obtained, whether for consideration or not; and (b) in relation to an *in vitro* embryo, a donor as defined in the regulations."

Under the regulations, donor means in relation to an *in vitro* embryo "an individual who has no spouse or common-law partner at the time the *in vitro* embryo was created, regardless of the source of the human reproductive material" or "the couple who are spouses or common-law partners at the time the *in vitro* embryo is created, regardless of the source of the human reproductive material used to create the embryo." *Assisted Human Reproduction (Section 8 Consent) Regulations*, SOR/2007-137, s 10.

common-law partner to use the reproductive material after the donor's death.[24]

[18] The status of the AHRA is in doubt as a result of the recent decision of the Supreme Court in *Reference re Assisted Human Reproduction Act*. A number of its provisions were struck down as unconstitutional as being outside the legislative authority of the federal government. However, the majority of the Court found that the provisions on consent were constitutional as a valid exercise of the criminal law power.[25]

B. Parentage for Posthumously Conceived Children

1. IMPORTANCE OF ESTABLISHING PARENTAGE

[19] The question is the determination of the child's legal parents at birth. Establishment of a parentage relationship is often required for inheritance under a will and is required for inheritance on intestacy. A child's status, obviously, has repercussions far beyond inheritance law. For example, entitlement to citizenship is often determined through parentage.[26]

2. THE LAW IN CANADA

[20] In most provinces, child status legislation makes the birth mother the mother of the child and defines the other parent based on presumptions and this applies to determination of parentage in the context of ART as well. [27] In Newfoundland and the Yukon, legislation provides for parentage in cases of artificial insemination of a woman using sperm from a man she is married or cohabiting with.[28] In British Columbia, the new *Family Law Act* [British Columbia Act] contains

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[24] *Assisted Human Reproduction (Section 8 Consent) Regulations*, SOR/2007-137, ss 3, 4.

[25] *Reference re Assisted Human Reproduction Act*, 2010 SCC 61; see also: John D Whyte, "Federalism and Moral Regulation: A Comment on *Reference re Assisted Human Reproduction Act*, (2011) 74 Sask L Rev 45; Barbara von Tigerstrom, "Federal Health Legislation and the *Assisted Human Reproduction Act Reference*" (2011) 74 Sask L Rev 33.

[26] *AA v BB*, 2007 ONCA 2, at para 14, rev *AA v BB*, (2003) 38 RFL 5th 1 (Ont Sup Ct J).

[27] ULCC Report at 8.

[28] Newfoundland and Labrador, *Children's Law Act*, RSNL 1990, c C-13, ss 6-10, 12; Yukon, *Children's Act*, RSY 2002, c 31, s 13.

provisions establishing parentage for the posthumously conceived child and is the first of its kind in Canada.[29]

[21] Section 28 of the British Columbia Act provides:[30]

> **Parentage if assisted reproduction after death**
>
> **28 (1)** This section applies if
>
> (a) a child is conceived through assisted reproduction,
>
> (b) the person *who provided the human re*productive material or embryo used in the child's conception
>
> (i) did so for that person's own reproductive use, and
>
> (ii) died before the child's conception, and
>
> (c) there is proof that the person
>
> (i) gave written consent to the use of the human reproductive material or embryo, after that person's death, by a person who was married to, or in a marriage-like relationship with, the deceased person when that person died,
>
> (ii) gave written consent to be the parent of a child conceived after the person's death, and
>
> (iii) did not withdraw the consent referred to in subparagraph (i) or (ii) before the person's death,
>
> **(2)** On the birth of a child born as a result of assisted reproduction in the circumstances described in subsection (1), the child's parents are
>
> (a) the deceased person, and
>
> (b) regardless of whether he or she also provided human reproductive material or the embryo used for the assisted reproduction, the person who was married to, or in a marriage-like relationship with, the deceased person when that person died.

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[29] *Family Law Act*, S.B.C. 2011, c 25 (not yet in force) [British Columbia Act].

[30] British Columbia Act, s 28.

3. THE LAW IN ALBERTA

[22] The FLA has recently been amended to clarify the status of children born through ART in Alberta. Under the previous section of the FLA which dealt with paternity and ART, it was unclear whether children born as a result of artificial insemination fell within the section. In addition, the section only allowed paternity to be declared for the birth mother and a male person.[31] In this regard, section 13(2) was held to be unconstitutional with respect to the rights of same-sex couples to a parentage declaration under the statute.[32]

[23] The relevant sections under the FLA are as follows:[33]

> **Interpretation**
>
> **5.1(1) In this Part,**
>
> (a) "assisted reproduction" means a method of conceiving other than by sexual intercourse;
>
> (b) "embryo" means an embryo as defined in the *Assisted Human Reproduction Act* (Canada);[34]
>
> (c) "human reproductive material" means human reproductive material as defined in the *Assisted Human Reproduction Act* (Canada)[35]
>
> (d) "surrogate" means a person who gives birth to a child as a result of assisted reproduction if, at the time of the child's conception, she intended to relinquish that child to
>
> (i) the person whose human reproductive material was used in the assisted reproduction or whose human reproductive material was used to create the embryo used in the assisted reproduction, or

---

[31] FLA, s 13 (repealed SA 2010 c 16 s 1(13).

[32] *Fraess v Alberta* 2005 ABQB 889.

[33] FLA, ss 5.1, 7(2), 8.1- 8.2, 9(4), 9(5).

[34] "'Embryo' means a human organism during the first 56 days of its development following fertilization or creation, excluding any time during which its development has been suspended, and includes any cell derived from such an organism that is used for the purpose of creating a human being," AHRA, s 3.

[35] "'Human reproductive material' means a sperm, ovum or other human cell or human gene, and includes a part of any of them." AHRA, s 3.

(ii) the person referred to in subclause (i) and the person who is married to or in a conjugal relationship of interdependence of some permanence with that person.

(2) For the purposes of this Part, if a child is born as a result of assisted reproduction, the child's conception is deemed to have occurred at the time the procedure that resulted in the implantation of the human reproductive material or embryo was performed. [footnotes added]

Rules of parentage

7(2) The following persons are the parents of a child:

(b) if the child was born as a result of assisted reproduction, a person identified under section 8.1 to be a parent of the child;

Assisted Reproduction

8.1(1) In this section and section 8.2,

(a) a reference to the provision of human reproductive material by a person means the provision of the person's own human reproductive material to be used for his or her own reproductive purposes;

(b) a reference to the provision of an embryo by a person means the provision of an embryo created using the person's own human reproductive material to be used for his or her own reproductive purposes.

(2) If a child is born as a result of assisted reproduction with the use of human reproductive material or an embryo provided by a male person only, the parents of the child are

(a) unless clause (b) or (c) applies, the birth mother and the male person;

(b) if the birth mother is a surrogate and, under section 8.2(6), she is declared not to be a parent and the male person is declared to be a parent, the male person and a person who

(i) was married to or in a conjugal relationship of interdependence of some permanence with the male person at the time of the child's conception, and

(ii) consented to be a parent of a child born as a result of the assisted reproduction and did not

withdraw that consent before the child's conception;

(c) unless section 8.2(9) applies, if the birth mother is a surrogate but does not consent to the application under section 8.2, the birth mother only.

(3) If a child is born as a result of assisted reproduction with the use of human reproductive material or an embryo provided by a female person only, the parents of the child are

(a) unless clause (b) or (c) applies, the birth mother and a person who

(i) was married to or in a conjugal relationship of interdependence of some permanence with the birth mother at the time of the child's conception, and

(ii) consented to be a parent of a child born as a result of assisted reproduction and did not withdraw that consent before the child's conception;

(b) if the birth mother is a surrogate and, under section 8.2(6), she is declared not to be a parent and the female person is declared to be a parent, the female person and a person who

(i) was married to or in a conjugal relationship of interdependence of some permanence with the female person at the time of the child's conception, and

(ii) consented to be a parent of a child born as a result of assisted reproduction and did not withdraw that consent before the child's conception;

(c) unless section 8.2(9) applies, if the birth mother is a surrogate but does not consent to the application under section 8.2, the birth mother only.

(4) If a child is born as a result of assisted reproduction with the use of human reproductive material or an embryo provided by both a male person and a female person, the parents of the child are

(a) unless clause (b) or (c) applies, the birth mother and the male person;

(b) if the birth mother is a surrogate and, under section 8.2(6), she is declared not to be a parent and the male person and female person are each declared to be a parent, the male person and the female person;

(c) unless section 8.2(9) applies, if the birth mother is a surrogate but does not consent to the application under section 8.2, the birth mother only.

(5) If a child is born as a result of assisted reproduction without the use of human reproductive material or an embryo provided by a person referred to in subsection (1)(a) or (b), the parents of the child are the birth mother and a person who

(a) was married to or in a conjugal relationship of interdependence of some permanence with the birth mother at the time of the child's conception, and

(b) consented to be a parent of a child born as a result of assisted reproduction and did not withdraw that consent before the child's conception.

(6) Unless the contrary is proven, a person is presumed to have consented to be a parent of a child born as a result of assisted reproduction if the person was married to or in a conjugal relationship of interdependence of some permanence with,

(a) in the case of a child born in the circumstances referred to in subsection (2), the male person referred to in that subsection,

(b) in the case of a child born in the circumstances referred to in subsection (3), the female person referred to in that subsection, or

(c) in the case of a child born in the circumstances referred to in subsection (5), the birth mother.

Surrogacy

8.2(1) An application may be made to the court for a declaration that

(a) a surrogate is not a parent of a child born to the surrogate as a result of assisted reproduction, and

(b) a person whose human reproductive material or embryo was provided for use in the assisted reproduction is a parent of that child.

> **(6)** The court shall make the declaration applied for if the court is satisfied that
>
> (a) the child was born as a result of assisted reproduction with the use of human reproductive material or an embryo provided by a person referred to in subsection (1)(b), and
>
> (b) the surrogate consents, in the form provided for by the regulations, to the application.
>
> **(7)** A person who is declared to be a parent of the child under subsection (6) and any person who, as a result of that declaration, is a parent of the child under section 8.1 are deemed to be the parents at and from the time of the birth of the child.
>
> **(9)** The court may waive the consent required under subsection (6) (b) if
>
> (a) the surrogate is deceased, or
>
> (b) the surrogate cannot be located after reasonable efforts have been made to locate her.
>
> **Declaration respecting parentage**
>
> **9(4)** If the court finds that a deceased person is or is not a parent of a child conceived before that person's death, the court may make a declaration to that effect.
>
> **(5)** In making a declaration under this section, the court shall give effect to any applicable presumption set out in section 8 and any applicable provision of section 8.1.

[24] It appears that parentage cannot be established for the posthumously conceived child in relation to the deceased parent. Conception is defined as the date at which the procedure which resulted in implantation of the embryo or human reproductive material was performed. The provision of human reproductive material or an embryo is defined as the provision of a "person's own reproductive material or embryo for his or her own reproductive use."[36]

[25] Where both parents are alive at the time of the birth of the child (outside of surrogacy), if human reproductive material or an embryo is provided by a male person only, the parents of the child are the birth

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[36] FLA, s 8.1(1).

mother and the male person. Where the reproductive material or embryo is provided by a female person only, the parents are the female person and the person who was the spouse or adult interdependent partner of the female person at the time of conception. If the human reproductive material or embryo is provided by both a female and a male person, the parents are the birth mother and the male person.[37] The FLA requires consent to be a parent on the part of the other person where the human reproductive material or embryo is provided by a female person only.[38]

[26] In the case of a posthumously conceived child, it appears to follow that the surviving spouse or partner will provide reproductive material or embryos "for his or her own reproductive use."[39] This is consistent with the AHRA. The consent required under the AHRA allows the surviving spouse or partner to use the human reproductive material or embryo for his or her own reproductive use after the death of the donor.[40]

[27] In the most common scenario of posthumous reproduction, the birth mother uses frozen sperm from the deceased father or frozen embryos created while the deceased was alive. Under the FLA, if the birth mother provides the human reproductive material or embryo, then the parents of the child are the birth mother and the person who was the spouse or adult interdependent partner of the birth mother at the time of the child's conception. The time of conception is defined as the date of the procedure which resulted in implantation. Thus, the deceased father could

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[37] FLA, s 8.1. The FLA also provides for parentage in cases where a child is born as a result of assisted conception without the use of human reproductive material or an embryo provided by an individual. This section appears to apply to situations where there is no genetic connection with either parent. FLA, s. 8.1(5).

[38] FLA, s 8.1(3).

[39] Debate continues over whether human reproductive material or embryos can be classified as property. In the Alberta case of *CC v AW* 2005 ABQB 290, a male friend donated sperm to help a women have a child. The woman underwent ART and as a result surplus embryos were frozen. The male friend wanted the surplus embryos destroyed. The court held that the sperm had been a gift; therefore, the frozen embryos belonged to the female person. This case was decided before the AHRA came into force, so its authority is perhaps doubtful. In the US, in *Davis v Davis* 842 SW 2d 588 (Tenn Sup Ct 1992) the court held that embryos were not property, but in a special "in between" category because of their potential to become human. With respect to inheritance, it is unclear whether human reproductive material could be bequeathed. It is also unclear whether a testator could delegate consent to use after death to a personal representative. See the discussion of both cases in: Clare E Burns & Anastasija Sumakova, "Mission Impossible: Estate Planning and Assisted Human Reproduction" (2010) 60 ETR (3d) 59 at 62-65.

[40] AHRA, s 8; *Assisted Human Reproduction (Section 8 Consent) Regulations*, SOR/2007-137, ss 3, 4.

not be a parent as he was not the spouse or adult interdependent partner of the birth mother at the time of conception.[41]

[28] A second possible scenario of posthumous reproduction is where the surviving father uses a surrogate to have a child using frozen *in vitro* embryos created with the deceased mother. If the father is the provider of the reproductive material and, assuming that the surrogate has consented not to be a parent, then the parents are the father and the person, if any, who was the spouse or adult interdependent partner of the father at the time of conception. Again, the deceased mother would not be a parent as she had died before the time of implantation.[42]

[29] Even if a court were to hold that a deceased could provide the reproductive material or embryo, there are gaps in the legislation. The only circumstances in which parentage might be established for the posthumously conceived child would be in heterosexual relationships with the human reproductive material or embryo provided by a deceased male person only or both a deceased male person and the birth mother.[43] This leaves out parentage for the child conceived after the mother has died using a surrogate. It does not establish parentage for the posthumously conceived child of same sex relationships.

[30] The court would be unable to make a declaration of parentage under the FLA as a declaration can only be made where a child is conceived (date of procedure which resulted in implantation) before the person's death.[44] It is possible that a parentage declaration might be made under the *parens patriae* jurisdiction of the court which can be used to fill a legislative gap. It would depend upon whether a court determined that the omission of posthumously conceived children in the FLA was a deliberate policy choice.[45]

[31] In the Ontario decision, *AA v BB*, a female same-sex couple had enlisted the help of a male friend to have a child. The issue for the court was whether the female partner could be declared a "mother," along with

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[41] FLA, ss 5.1(2), 8.1(3).

[42] FLA, ss 5.1(2), 8.1(2). Potentially, frozen eggs from the deceased mother could also be used.

[43] FLA, s 8.1(2), (4).

[44] FLA, s 9(4).

[45] On the *parens patriae* jurisdiction of the court, see also: *Beson v Newfoundland (Director of Child Welfare)* [1982] 2 SCR 716; *E (Mrs) v Eve* [1986] 2 SCR 388.

the birth mother. The female partner did not want to apply for adoption as that would result in the father losing his status as a parent. The Court of Appeal held that the inherent *parens patriae* jurisdiction of the court may be used to "bridge a legislative gap." The jurisdiction is very broad and its categories are never closed. The purpose of the Ontario legislation was to give all children equal status and was not intended to confine declarations to biological or genetic links. Reproductive technologies had created gaps in the scheme as a child could have two women or two men as parents. The child was "deprived of the equality of status that declarations of parentage provide." There was nothing in the history of the legislation to find that the legislature had made a "deliberate policy choice to exclude the children of lesbian mothers." The court issued a declaration that the partner was a mother of the child.[46]

[32] Such a declaration would likely allow the registration of the birth under the *Vital Statistics Act*.[47] In Alberta, registration of a birth under the *Vital Statistics Act* acts to presumptively establish parentage. Section 32(1) provides that a certificate "shall be admitted in evidence as proof, in the absence of evidence to the contrary, of the facts certified to be recorded."[48] At present, registration is often relied on. However, the legal status of a child is governed by parentage provisions and not by an administrative procedure.[49]

C. Can a Posthumously Conceived Child Inherit on Intestacy

[33] On intestacy, the posthumously conceived child appears to be excluded under the existing provisions with respect to posthumous births in most other provinces.[50] The British Columbia Act amends the *Wills, Estates and Succession Act* (not yet in force) to give a posthumously

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[46] *AA v BB*, 2007 ONCA 2, rev *AA v BB*, (2003) 38 RFL 5th 1 (Ont Sup Ct J).

[47] ULCC Report at 6.

[48] *Vital Statistics Act*, RSA 2000, c V-4, s 32(1).

[49] ULCC Report at 6.

[50] *The Intestate Succession Act*, CCSM, c 185, s 1(3); *Devolution of Estates Act*, RSNB 1973, c D-9, s 30; *Intestate Succession Act*, RSN 1990, c I-21, s 12; *Intestate Succession Act*, RSNS 1989, c 236, s 12; *Succession Law Reform Act*, RSO 1990, c S.26, s 47(9); *Probate Act*, RSPEI 1988, c P-21, s 95; *The Intestate Succession Act,1996*, SS 1996, c I-13.1, s 14. This is the view taken by the Manitoba Law Reform Commission in relation to Manitoba's legislation. Manitoba Law Reform Commission, *Posthumously Conceived Children: Intestate Succession and Dependants Relief*, Report 118 (2008) at 4 [Manitoba Report].

conceived child inheritance rights from a deceased parent on intestacy and under a will.[51]

467 The following section is added:

Posthumous births if conception after death

8.1 (1) A descendant of a deceased person, conceived and born after the person's death, inherits as if the descendant had been born in the lifetime of the deceased person and had survived the deceased person if all of the following conditions apply:

(a) a person who was married to, or in a marriage-like relationship with, the deceased person when that person died gives written notice, within 180 days from the issue of a representation grant, to the deceased person's personal representative, beneficiaries and intestate successors that the person may use the human reproductive material of the deceased person to conceive a child through assisted reproduction;

(b) the descendant is born within 2 years after the deceased person's death and lives for at least 5 days;

(c) the deceased person is the descendant's parent under Part 3 of the *Family Law Act*.

(2) The right of a descendant described in subsection (1) to inherit from the relatives of a deceased person begins on the date the descendant is born.

(3) Despite subsection (1)(b), a court may extend the time set out in that subsection if the court is satisfied that the order would be appropriate on consideration of all relevant circumstances.

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[51] British Columbia Act, s 467.

[34] The WSA provides:[52]

> **Interpretation**
>
> **1(3)** If an individual is a parent of a child within the meaning of Part 1 of the *Family Law Act*, that individual is a parent of the child for all purposes under this Act, including for the purposes of determining, at any generation, whether the child or parent is an ascendant or descendant of another individual.
>
> **Definitions**
>
> **58(2)** A reference in this Part to a "child", to a "descendant" or to "kindred" includes any child who is in the womb at the time of the deceased's death and is later born alive.

In addition, section 66(1) provides:[53]

> **Per Stirpes Distribution to Descendants**
>
> **66(1)** When a distribution is to be made under this Part to the descendants of any individual, the intestate estate or the portion of it being distributed shall be divided into as many shares as there are
>
> (a) children of that individual who survived the intestate, and
>
> (b) deceased children of that individual who left descendants surviving the intestate.

[35] The first provision is a codification of the common law *en ventre sa mère* rule of construction and appears to exclude the posthumously conceived child.[54] With respect to section 66(1), is the posthumously conceived child a "survivor" of the intestate deceased parent? In *Khabbaz v*

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[52] WSA, ss 1(3), 58(2). Posthumously conceived children appear to be excluded under the current legislation as well. Section 10 provides "Descendants and relatives of the intestate, conceived before the intestate's death but born afterwards, shall inherit as if they had been born in the lifetime of the intestate and had survived the intestate." *Intestate Succession Act*, RSA 2000, c I-10, s 10. Arguments might be made that a frozen embryo is included under this type of language.

[53] WSA, s 66(1).

[54] A child *en ventre sa mère* is defined as being in its mother's womb. For the purposes of wills, the common law applies a legal fiction and treats a child *en ventre sa mère* as if it had been born in the lifetime of the testator. This allows the child to take an inheritance under the will. *Williams on Wills* by C H Sherrin, R F D Barlow & R A Wallington, 8th ed (London: Butterworths, 2002) v 1 at 715; Karen M Weiler, "The Unborn Child: Common-Law Canada" *Proceedings of the International Symposium on Comparative Law* No. 13 (Ottawa: University of Ottawa Press, 1975) at 14.

Commissioner, a US case involving posthumously conceived children, the Court held that to survive the intestate meant that a person had to be alive at the time of the intestate's death.[55] These provisions, taken together with the inability to establish parentage in relation to the deceased parent, exclude the posthumously conceived child from a share on intestacy from the deceased parent and relatives of the deceased parent.[56]

D. Can a Posthumously Conceived Child Inherit under a Will?

[36] Under the WSA, the relevant sections are as follows:[57]

> **Interpretation**
>
> **1(3)** If an individual is a parent of a child within the meaning of Part 1 of the *Family Law Act*, that individual is a parent of the child for all purposes under this Act, including for the purposes of determining, at any generation, whether the child or parent is an ascendant or descendant of another individual.
>
> **References to children, descendants or issue**
>
> **28** Unless the Court, in interpreting a will, finds that the testator had a contrary intention, references in the will to the children, descendants or issue of any individual, including the testator, must be interpreted as including
>
> (a) any child for whom that individual is a parent within the meaning of Part 1 of the *Family Law Act*, and
>
> (b) any child who is in the womb at the time of the testator's death and is later born alive.

[37] The provision in section 28(b) represents a codification of the common law *en ventre sa mère* rule. In most other provinces, and indeed, most other common law jurisdictions, this rule remains a common law rule of construction.[58]

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[55] *Khabbaz v Comm'r, Soc Sec Admin*, 930 A2d 1180 (NH 2007) See also: Browne C Lewis, "Dead Men Reproducing: Responding to the Existence of Afterdeath Children" (2008) 16:2 Geo Mason L Rev 403 at 420-423.

[56] See the discussion on parentage above.

[57] WSA, ss 1(3), 28. See also British Columbia Act, s 467.

[58] Roderick R M Paisley, "The Succession Rights of the Unborn Child" (2006) 10 Edinburgh L Rev 28 at 32-33.

1. TESTAMENTARY INTENT AND THE POSTHUMOUSLY CONCEIVED CHILD

[38] It appears that a testator may expressly make a gift to a posthumously conceived child in a will with appropriate drafting.[59] The testator may also expressly exclude the child, although under the WSA this is possibly unnecessary.

[39] Where there is no express gift in a will, but generic references to children, descendants or issue, the WSA interprets such references to include any child for whom an individual is parent under the FLA and a child who is in the womb at the death of the testator.[60] This interpretation rule will not be applied if the court finds that the testator had a contrary intention.[61] As discussed above, it is unlikely that parentage can be established under the FLA in respect of the deceased parent. This fact coupled with the requirement that a child be in the womb at the testator's death means that a posthumously conceived child will not inherit from or through the deceased parent unless the court finds a contrary intention on the part of the testator.

[40] The traditional rule is that the contrary intention must be found in the wording of the will itself, either expressly or by implication.[62] The case law is mixed as to whether a court can look at evidence outside the words in the will to determine if there is a contrary intention.[63] However, the WSA provides for admission of extrinsic evidence:

> **Interpretation and evidence**
>
> **26** A will must be interpreted in a manner that gives effect to the intent of the testator, and in determining the testator's intent the Court may admit the following evidence:

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[59] Helene S Shapo, "Matters of Life and Death: Inheritance Consequences of Reproductive Technologies" (1996-97) 25:4 Hofstra L Rev 1091 at 1155; Knaplund 2004 at 110; Greenfield, note 7 at 283.

[60] In effect, the FLA limits parentage to children *en ventre sa mère*, so the latter section is perhaps redundant. See FLA, ss 8, 8.1

[61] WSA, s 28. This is an example of a statutory construction rule. Statutory construction rules are default rules which cover items the testator may have forgotten or operate to prevent partial intestacies. Alberta Law Reform Institute, *Wills and the Legal Effects of Changed Circumstances*, Final Report 98 (2010) at 95-96 [Alberta Report].

[62] Alberta Report at 100.

[63] Alberta Report at 100-104.

> (a) evidence as to the meaning, in either an ordinary or a specialized sense, of the words or phrases used in the will,
>
> (b) evidence as to the meaning of the provisions of the will in the context of the testator's circumstances at the time of the making of the will, and
>
> (c) evidence of the testator's intent with regard to the matters referred to in the will.

[41] In what circumstances would the court find a contrary intent? It is debatable whether the storage of reproductive material without more would constitute such intent. Commentators are divided on this issue with some taking the position that donation of reproductive material implies consent to parentage and inheritance for any posthumously conceived children.[64] Other writers believe the consent to posthumous parentage must be explicit.[65]

[42] In summary, a testator should be able to include a posthumously conceived child in a will by an express statement. Alternatively, a court might find an intention to include a posthumously conceived child on the basis of evidence as to the circumstances at the time the will was made or evidence as to the testator's intent in regard to any posthumously conceived children.

2. THE RULE AGAINST PERPETUITIES

[43] The rule against perpetuities emerged from two hundred years of judicial decision-making and has challenged the mental capacities of lawyers ever since. The rule aims to restrict the length of certain limitations on the transfer of property. The modern rationale for the continued existence of the rule is that it serves to balance the freedom of

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[64] Julie E Goodwin, "Not All Children are Created Equal: A Proposal to Address Equal Protection Inheritance Rights of Posthumously Conceived Children" (2004-2005) 4:2 Conn Public Int LJ 234 at 280-281. The ULCC-CSSO Working Group states that "In most AHR situations in Canada, the deceased person will need to have consented to parent or to be a parent of the child, as required under current AHR Canada regulations." ULCC Report at 15.

[65] VanCannon at 360.

the current generation to deal with property against the freedom of the future generation to enjoy that property.[66]

[44] The utility of the rule was endorsed by the report of the Alberta Institute of Law Research and Reform in 1971.[67] However, the rule has been abolished in Manitoba, Saskatchewan, Ireland, South Australia and some US states.[68] Most recently, abolition of the rule has been recommended by the Law Reform Commission of Nova Scotia.[69] The Uniform Law Conference of Canada Working Group on a *Uniform Trustee Act* is also of the view that the rule should be abolished.[70]

[45] The common law rule still remains in Alberta. If an interest will be void under the common law rule, then the *Perpetuities Act* contains provisions which will save the gift in most cases.[71]

[46] The common law rule may be stated as follows:[72]

> An interest is only good if it must vest, if it vests at all, not later than 21 years after the death of some life in being who was alive or *en ventre sa mère* at the creation of the interest. If no such life in being was in existence at the creation of the interest, then the term of 21 years only is allowed.

[47] In the succession context, the date of the creation of the interest is the death of the testator. The Nova Scotia Law Reform Commission describes the operation of the common law rule in the usual situation under a will as follows:[73]

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[66] Les A McCrimmon, "Gametes, Embryos and the Life in Being: The Impact of Reproductive Technology on the Rule Against Perpetuities" (1999-2000) 34:4 Real Prop Prob Tr J 697 at 713-714.

[67] Alberta, Institute of Law Research and Reform, *The Rule Against Perpetuities*, Final Report 6 (1971) at 2.

[68] Law Reform Commission of Nova Scotia, *The Rule Against Perpetuities*, Final Report (2010) at 22-23 [Nova Scotia Report].

[69] Nova Scotia Report at 6.

[70] Uniform Law Conference of Canada, *Proceedings of the Ninety-first Annual Meeting* (Ottawa: Ont 2009) Appendix J, Russell J Getz, "Uniform Trustee Act Progress Report" at 8-9, online: <http://www.ulcc.ca/en/poam2 (see 2009, Civil Section Documents).

[71] *Perpetuities Act*, RSA 2000, c P-5 [*Perpetuities Act*].

[72] L A McCrimmon, "Understanding the Rule Against Perpetuities: Adopting a Five-Step Approach to a Perpetuities Problem" (1997) 5 Austl Prop LJ 130 as reprinted in Bruce Ziff *et al*, *A Property Law Reader: Cases, Questions, and Commentary*, 2d ed (Toronto: Thompson Carswell, 2008) 543 at 545. See also: J MacKenzie, ed, *Feeney's Canadian Law of Wills*, 4th ed, looseleaf (Markham, Ont: Butterworths Canada, 2000) at § 18.4 [Feeney].

[73] Nova Scotia Report at 8.

> In the typical scenario of a will, which may gift certain property to be held in trust until the happening of a certain event, it must be certain that the property will absolutely vest in the entitled person or persons before twenty-one years has passed since the death of a person whose life is relevant to when the property will vest, and who was alive at the time of the testator's death. If not, with limited exceptions, the entire gift is declared invalid. For example, a gift to be held in trust for 'the first of my grandchildren to turn 25', would be void at the outset, because the gift might vest outside the perpetuities period.

[48] The common law rule is very complex. For example, while the rule applies to most contingent interests, whether an interest is vested or contingent is not always clear. Similarly, the concept of "lives in being" through which the perpetuity period is calculated is uncertain.[74] The rule is usually violated due to inadvertent drafting errors.[75]

[49] Posthumously conceived children could potentially invalidate an otherwise valid class gift under the common law. This is because the rule is concerned with theoretical possibilities and the faintest likelihood that the gift will vest outside the perpetuity period will make the gift void from the outset.[76] The calculation of whether an interest is valid or not is based on the assumption that a person cannot have any more children after death (except for a period of gestation for a child in the womb before death). If the potential for a posthumously conceived child is taken into account, previously valid interests may no longer be valid.

[50] Academic commentators have outlined examples of how otherwise valid common law gifts will be invalid when posthumously conceived children are taken into account.[77] One example will be given here.[78] Consider a gift in a will "to X's children who reach the age of 21." X has

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[74] Nova Scotia Report at 16.

[75] Nova Scotia Report at 14.

[76] Feeney at § 18.6.

[77] Sharona Hoffman & Andrew P Morriss, "Birth After Death: Perpetuities and the New Reproductive Technologies" (2003-2004) 38:2 Ga L Rev 575 at 601-613; Greenfield, note 7 at 288-299; Knaplund 2004 at 113.

[78] This example follows a traditional approach to the determination of what constitutes a life in being, L A McCrimmon, "Understanding the Rule Against Perpetuities: Adopting a Five-Step Approach to a Perpetuities Problem" (1997) 5 Austl Prop LJ 130 as reprinted in Bruce Ziff *et al, A Property Law Reader: Cases, Questions, and Commentary*, 2nd ed (Toronto: Thompson Carswell, 2008) 543 at 546.

two children at the death of the testator. This is a valid bequest under the common law. X is the "life in being" as the children cannot be "lives in being" because X could have more children following the death of the testator. Any children of X must reach 21 years of age within 21 years of X's death. However, if the possibility of a posthumously conceived child is taken into account, the gift will be invalid. X's child could be born a number of years after X's death. The child would reach the age of 21 outside the perpetuity period of 21 years from the death of the "life in being."[79]

[51] Posthumously conceived children raise questions with respect to the determination of who is a "life in being" as well. Should the life of a "life in being" include the length of time during which human reproductive material remains viable? In 1962, Barton Leach published an article suggesting that determination of the length of the "life in being" of a male should include any period after his death during which his sperm remains fertile.[80] Should a frozen embryo be counted as a "life in being"? Is a frozen embryo analogous to a child *en ventre sa mère*?[81]

[52] When a gift would fail under the common law rule of perpetuities, the Alberta *Perpetuities Act* contains a number of provisions designed to save the bequest.[82] The "wait and see" provision lies at the heart of the legislation. One waits to see whether actual events show that the interest must vest or will not vest within the perpetuity period (death of the last statutory life in being plus 21 years) as calculated under the Act. The list of statutory lives in being is extensive.[83] If it is determined that the interest will not vest, the other sections of the Act are applied, such as reduction of

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[79] L A McCrimmon, "Understanding the Rule Against Perpetuities: Adopting a Five-Step Approach to a Perpetuities Problem" (1997) 5 Austl Prop LJ 130 as reprinted in Bruce Ziff *et al, A Property Law Reader: Cases, Questions, and Commentary*, 2nd ed (Toronto: Thompson Carswell, 2008) 543 at 551-552; Sharona Hoffman & Andrew P Morriss, "Birth After Death: Perpetuities and the New Reproductive Technologies" (2003-2004) 38:2 Ga L Rev 575 at 601-602; W Barton Leach, "Perpetuities in a Nutshell" (1937-38) 51 Harv L Rev 638 at 641.

[80] W Barton Leach, "Perpetuities in the Atomic Age: The Sperm Bank and the Fertile Decedent" (1962) 48 ABAJ 942 at 944.

[81] Les A McCrimmon, "Gametes, Embryos and the Life in Being: The Impact of Reproductive Technology on the Rule Against Perpetuities" (1999-2000) 34:4 Real Prop Prob Tr J 697 at 709-717.

[82] For example, s 9 provides for presumptions as to the ability to have a child. This section is applied first to attempt to save the gift and can be rebutted by contrary evidence. Evidence of storage of reproductive material would presumably be such contrary evidence. *Perpetuities Act*, note 71, s 9.

[83] *Perpetuities Act*, note 71, ss 4-5.

age and a *cy-pres* provision.[84] Given the flexibility of the Act, most bequests will be saved from invalidity.

[53] If the courts take posthumously conceived children into account, valid gifts under the common law may be void. As a result, the *Perpetuities Act* will be applied. The period for which it is necessary to "wait and see" can be lengthy.[85] During this period, the final legality of the bequest will be in limbo. In addition, it may be uncertain as to who is entitled to any income from the property.[86]

3. THE CLASS CLOSING RULES

[54] The class closing rules are rules of construction which apply to class gifts.[87] They are sometimes collectively referred to as the rule of convenience.[88] When a testator gives property to a class of beneficiaries, there is the need to determine the number of persons in the class and when the class is to be closed to further members.[89] The rules apply to four situations: an immediate gift under a will; a postponed gift, such as a gift which follows a life estate; a contingent gift, such as a gift dependent on the beneficiary reaching a certain age; and, a postponed and contingent gift.[90] The courts have been averse to applying the class closing rules where the result would be a void gift. The rules will not be applied to close the class unless there is a beneficiary in whom the gift will immediately vest. In some cases, the rules will be used to save a gift from being void under the rule against perpetuities.[91]

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[84] *Perpetuities Act*, note 71, ss 6-8. Section 6 provides for reduction of a specified age over 21, if reducing the age would make the gift valid. Section 7 provides for exclusion of class members who would make a gift invalid under s 6. Section 8 contains the cy-pres provision which allows the court to change a disposition to be in line with the intent of the testator and in compliance with the rule against perpetuities.

[85] Sharona Hoffman & Andrew P Morriss, "Birth After Death: Perpetuities and the New Reproductive Technologies" (2003-2004) 38:2 Ga L Rev 575 at 603, 608-611.

[86] Nova Scotia Report at 26.

[87] Roger Kerridge, *Hawkins on the Construction of Wills*, 5th ed (London: Sweet & Maxwell, 2000) at 197 [Hawkins].

[88] Feeney at § 14.23.

[89] Hawkins, note 87 at 197.

[90] Hawkins, note 87 at 200.

[91] Feeney at § 14.52

[55] For the posthumously conceived child, the issue is whether a class should remain open to take account of the potential for the birth of such a child. The rules are ousted by a contrary intention on the part of the testator indicating that the class is to remain open.[92] It is uncertain as to what actions on the part of the deceased will be held to constitute such an intention.[93]

[56] The following are some examples of the operation of the rules with respect to a bequest to a posthumously conceived child.

- A specific bequest to "my posthumous child" or "my posthumous children."[94]

  Here, there is an intention expressed in the will and the class closing rules should not apply.[95]

- An immediate gift to "my children" and there are children at the date of the testator's death.[96]

  Under the common law rule, with a direct gift with no stipulation as to vesting, if there are class members in existence at the time of death, the class closes at the date of death and after-born members are excluded. Children *en ventre sa mère* would be included.[97] Where there is no evidence that reproductive material was stored with the intention of having posthumously conceived children, it is probable that the court would apply the common law rule and the class would close at the death of the testator.[98]

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[92] If the court finds such a contrary intention, the rules will not be applied. The rules may be excluded "either (i) by a really emphatic and unambiguous intention that the testator intended to benefit all members of the class whenever born or (ii) by a clear indication that the fund should not be divided until some moment later than that which the rules normally prescribe." Hawkins, note 87 at 199-200.

[93] Knaplund 2004 at 108-113. She outlines a number of situations in which a court might leave a class open to allow for the birth of a posthumously conceived child and speculates that stored reproductive material or embryos may result in a class being left open.

[94] Knaplund 2004 at 110.

[95] Feeney at § 14.14.

[96] Knaplund 2004 at 110.

[97] Feeney at §§ 14.24 -14.25.

[98] Knaplund 2004 at 110-111.

- An immediate gift to "my children" and the testator has no children at the date of death, but has frozen reproductive material.[99]

  If the gift was to the children of another person (for example, the spouse or partner), the class would remain open and all future born members would take under the gift.[100] However, with a gift to the testator's own non-existent children, there are the same difficulties with finding an intention to reproduce posthumously as discussed above. If the widow or partner stated an intention to have future children, the class might be kept open. Otherwise, for practical reasons, the court would likely close the class.[101]

- There is a life estate to the spouse with remainder to the testator's children.[102]

  Under the common law rules, the class would remain open until the death of the spouse and all children alive at the testator's death and those born before the death of the spouse would be members of the class.[103] Thus, posthumously conceived children would be included.

E. Is a Posthumously Conceived Child Eligible for Family Maintenance and Support?

[57] Under the WSA, a posthumously conceived child does not appear to be eligible for family maintenance and support. "Family member" is defined as including:[104]

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[99] Knaplund 2004 at 111.

[100] Feeney at § 14.28.

[101] Knaplund 2004 at 111.

[102] Knaplund 2004 at 112.

[103] Feeney at §§ 14.29-14.35.

[104] WSA, s 72.

72. In this Part

72(b) "family member" means, in respect of a deceased,

(iii) a child of the deceased who is under the age of 18 years at the time of the deceased's death, including a child who is in the womb at that time and is later born alive;..."

While the posthumously conceived child may not apply for family maintenance and support, the court is able to take into account the fact that an individual has been given a bequest under the deceased's will in making an order with respect to another family member.[105]

[105] WSA, s 93.

CHAPTER 3

Law and Policy in Other Jurisdictions

A. Can Posthumously Conceived Children Inherit on Intestacy or Under a Will in Other Commonwealth Countries?

[58] For a posthumously conceived child to inherit, legislation must not prohibit the use of reproductive materials posthumously, legislation must not exclude these children and parentage must be able to be established. For example, in Western Australia, legislation prohibits the posthumous use of gametes.[106] In Victoria, parentage may be established for the sole purpose of registering the birth.[107] In other jurisdictions, succession laws may not allow posthumously conceived children to inherit from the deceased parent on intestacy or, in some cases, under a will as well.[108]

[59] In the United Kingdom, posthumously conceived children are only given the right to have their parentage registered and do not have succession rights either on intestacy or under a will. The *Human Fertilisation and Embryology Act 2008* allows the deceased father to be registered as the father at a registry of births.[109] Consent must have been given in writing for the use of the sperm or placing of an embryo after death.[110] The father is not to be treated as the father of the child for any

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[106] In Western Australia, the *Human Reproductive Technology Act 1991* prohibits the posthumous use of gametes. Western Australia, *Directions, Human Reproductive Technology Act 1991*, Western Australia Government Gazette, No 201, 30 November 2004, Direction 8.9, 5435. See also: Rebecca Collins, "Posthumous Reproduction and the Presumption against Consent in Cases of Death Caused by Sudden Trauma" (2005) 30:4 Journal of Medicine and Philosophy 431 at 432-433; Victorian Law Reform Commission, *Assisted Reproductive Technology and Adoption*, Final Report at 93.

[107] Victoria, *Status of Children Act 1974*, s 40.

[108] For example, New South Wales, *Succession Act 2006 No 80*, s 3(2) "A reference in this Act to a child or issue of any person includes a child or issue who is born after the person's death after a period of gestation in the uterus which commenced before the person's death and survives the person for at least 30 days after birth." This provision applies to wills and intestate succession. New Zealand, *Administration Act 1969*, No 52, s 2(1), "references to a child or issue living at the death of any person include a child or issue who is conceived but not born at the death and who is subsequently born alive."

[109] UK, *Human Fertilisation and Embryology Act 2008*, 2008 c 22. The provisions on parenthood came into force on April 6, 2009.

[110] UK, *Human Fertilisation and Embryology Act 2008*, 2008 c 22, ss 39- 40.

other purpose.[111] In addition, the Act has provisions for a woman in a relationship with another woman to be named as the other parent of a child.[112] With posthumous conception, the woman is treated as the other parent for the purpose of registration only.[113]

B. Can Posthumously Conceived Children Inherit in the United States?

1. STATE LEGISLATION

[60] The vast majority of states in the US do not deal specifically with posthumously conceived children. Approximately ten states have legislation allowing a posthumously conceived child to inherit on intestacy if certain requirements are met.[114] The majority of these states require written consent prior to death for posthumous use of reproductive material, require that a couple have been married before frozen sperm can be used after death and place time restrictions on the ability of the child to inherit.

[61] The legislation in California appears to be the most comprehensive. This legislation was passed in 2004. The deceased must have consented in writing to posthumous reproduction and designated an individual able to use the gametes after death. The child must be *in utero* within two years of the death.[115]

[62] In states which have not specifically addressed posthumously conceived children by statute, the court rulings indicate that the state inheritance law must be "sufficiently vague to permit such an

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[111] UK, *Human Fertilisation and Embryology Act 2008*, 2008 c 22, s 48.

[112] This can be as a result of a civil partnership or simply by agreement. UK, *Human Fertilisation and Embryology Act 2008*, 2008 c 22, s 46.

[113] UK, *Human Fertilisation and Embryology Act 2008*, 2008 c 22, s 48.

[114] Knaplund 2008 at 401-402; Charles P Kindregan, Jr, "Dead Dads: Thawing an Heir from the Freezer" (2008-2009) 35:2 Wm Mitchell L Rev 433 at 441-443; Morgan Kirkland Wood, "It Takes a Village: Considering the Other Interests at Stake when Extending Inheritance Rights to Posthumously Conceived Children" (2009-2010) 44:3 Ga L Rev 873 at 889-893.

[115] Charles P Kindregan, "Dead Dads: Thawing an Heir from the Freezer" (2008-2009) 35:2 Wm Mitchell L Rev 433 at 443.

interpretation."[116] The wording in many of these statutes is similar to the wording of some Canadian intestacy legislation.[117] For example, in Pennsylvania, the statute reads: "Persons begotten before the decedent's death but born thereafter shall take as if they had been born in his lifetime." Similarly, in Tennessee the provision states: "Relatives of the decedent conceived before the decedent's death but born thereafter inherit as if they had been born in the lifetime of the decedent."[118] In the opinion of one commentator, this language leaves open the question of whether a posthumously conceived child can inherit because the statutes do not state that this is the only circumstances in which a child not alive at the time of the testator's death can inherit.[119]

[63] Most US states have pre-termitted heir statutes which give children some protection against being disinherited under a will.[120] The concept originated in Roman law and the statutes in the US date from the 18th century.[121] The rationale is that the failure to include a child in a will must have been inadvertent.[122] In general, the statutes only apply to children born or adopted after the making of the will.[123] Typically, they do not apply to a child who has been intentionally left out of a will.[124] In the view of one commentator, posthumously conceived children should be able to

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[116] Charles P Kindregan, "Dead Dads: Thawing an Heir from the Freezer" (2008-2009) 35:2 Wm Mitchell L Rev 433 at 446.

[117] *The Intestate Succession Act*, CCSM, c. 185, s 1(3); *Devolution of Estates Act*, RSNB. 1973, c D-9, s 30; *Intestate Succession Act*, RSN 1990, c I-21, s 12; *Intestate Succession Act*, RSNS 1989, c 236, s 12; *Succession Law Reform Act*, RSO 1990, c S.26, s 47(9); *Probate Act*, RSPEI 1988, c P-21, s 95; *The Intestate Succession Act,1996*, SS 1996, c I-13.1, s 14.

[118] Knaplund 2008 at 408 at n 87.

[119] Knaplund 2008 at 408.

[120] The word "pretermitted" comes from the Latin "praeter". Some statutes, including the *Uniform Probate Code*, use the term "omitted" instead. William M McGovern, Jr & Sheldon F Kurtz, *Wills, Trusts and Estates* 2d ed (St Paul, Minn: Westgroup, 2001) at 130, § 3.5, n 1.

[121] William M McGovern, Jr & Sheldon F Kurtz, *Wills, Trusts and Estates* 3rd ed (St Paul, Minn: West, 2004) at 139-40.

[122] William M McGovern, Jr & Sheldon F Kurtz, *Wills, Trusts and Estates* 2d ed (St Paul, Minn: Westgroup, 2001) at 130.

[123] James E Bailey, "An Analytical Framework for Resolving the Issues Raised by the Interaction Between Reproductive Technology and the Law of Inheritance" (1997-1998) 47:4 DePaul L Rev 743 at 793. For a detailed discussion of the variations in the statutes, see: American Law Institute, *Restatement (Third) of Property: Wills & Other Donative Transfers*, (St Paul, Minn: American Law Institute Publishers, 1999-2011) at § 9.6 (WL Canada) [American Law Institute Report].

[124] American Law Institute Report, note 123, at § 9.6 (i).

inherit under these statutes.[125] New York's statute was amended to exclude the posthumously conceived child.[126]

2. CASE LAW

[64] A number of cases have arisen in the US courts and whether the posthumously conceived child can inherit or collect state benefits has depended on the wording of the relevant legislation. Most of the cases have involved claims by children for social security benefits. Social security legislation mandates reference to state intestacy statutes for determination of eligibility, in particular, for a definition of "child" or "children."[127]

[65] In *Woodward v Commissioner of Social Security*, the issue was whether a posthumously conceived child was eligible for social security benefits through the deceased parent. The court looked at the state's law on intestacy to determine this question as required under the federal social security legislation. The law did not have a provision that a child be in existence or alive at the time of the parent's death. The court found that the posthumously conceived child could inherit on intestacy as long as two requirements were met. First, it had to be determined that the child was the genetic child of the deceased and second, it had to be shown that the deceased had consented to having a posthumously conceived child and to supporting the child. These requirements were met in this case and the child was eligible to receive the social security benefits.[128]

[66] Similarly, *In re Estate of Kolacy*, the court interpreted the New Jersey intestate succession legislation to declare posthumously conceived twin girls as heirs. The statute provided that "relatives of the deceased conceived before his death but born thereafter inherit as if they had been born in the lifetime of the decedent." The court found that when the provision had originally been put in place, ART had not been possible. The court interpreted the statute liberally, focussing on the legislative

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[125] Ronald Chester, "Freezing the Heir Apparent: A Dialogue on Postmortem Conception, Parental Responsibility and Inheritance" (1996-1997) 33:4 Hous L Rev 967 at 988.

[126] Knaplund 2008 at 411-412.

[127] Manitoba Report at 7.

[128] *Woodward v Commissioner of Social Security*, 760 NE 2d 257, 17 ALR 6th 851 (Mass 2002) See also: Greenfield, note 7 at 285; Renee H Sekino, "Posthumous Conception: The Birth of a New Class – *Woodward v Commissioner of Social Security*" (2002) 8 BU J Sci & Tech L 362.

intent that children should inherit from their parents and through their parents from other relatives. In the court's view, a posthumously conceived child should routinely be granted the status of heir unless it would cause serious difficulties in administering the estate or be unfair to other beneficiaries.[129] Again, in *Gillett-Netting v Barnhart*, Arizona legislation was interpreted so as to allow posthumously conceived twins to receive social security benefits.[130]

[67] On the other hand, in *Khabbaz v Commissioner*, the court found that the New Hampshire intestacy statute did not include a posthumously conceived child as "surviving issue." The definition of "surviving" meant that the child in question had to be in existence or alive at the time of the parent's death. The court found that while a posthumously conceived child was unprotected, it was a matter for the legislature. [131]

[68] Once more, in *Stephen v Commissioner of Social Security*, the court found that the Florida intestacy statute, which specifically addressed the issue of posthumous conception, precluded the child from inheriting under Florida intestacy law and, consequently, from receiving social security benefits as well.[132] Finally, in *Finley v Astrue*, the court interpreted the Arkansas statute as not including an embryo implanted after the husband's death. The court held that the child had not been conceived during the husband's lifetime and the issue of when conception occurs was a matter for the legislature.[133]

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[129] *In re Estate of Kolacy*, 753 A 2d 1257 (NJ 2000). See also: Joseph H Karlin, "'Daddy, Can You Spare a Dime?': Intestate Heir Rights of Posthumously Conceived Children" (2006) 79:4 Temp L Rev 1317 at 1323 -1324.

[130] *Gillett-Netting v Barnhart*, 371 F 3d 593 (Ariz 2004) See also: Joseph H Karlin, "'Daddy, Can You Spare a Dime?': Intestate Heir Rights of Posthumously Conceived Children" (2006) 79:4 Temp L Rev 1317 at 1326-1327.

[131] *Khabbaz v Comm'r, Soc Sec Admin*, 930 A 2d 1180 (NH 2007) See also: Browne C Lewis, "Dead Men Reproducing: Responding to the Existence of Afterdeath Children" (2009) 16:2 Geo Mason L Rev 403 at 420-423.

[132] *Stephen v Commissioner of Social Security*, 386 F Supp 2d 1257 (Fla 2005) See also: Robert Matthew Harper, "Dead Hand Problem: Why New York's Estates, Powers and Trusts Law Should Be Amended to Treat Posthumously Conceived Children as Decedents' Issue and Descendants" (2008) 21:3&4 Quinnipiac Prob LJ 267 at 277.

[133] *Finley v Astrue*, 601 F Supp 2d 1092 (Ark 2009) See also: Robert Matthew Harper, "Dead Hand Problem: Why New York's Estates, Powers and Trusts Law Should Be Amended to Treat Posthumously Conceived Children as Decedents' Issue and Descendants" (2008) 21:3&4 Quinnipiac Prob LJ 267at 278-279.

[69] The case of *In re Martin B.* involved distribution of a trust. The testator's son had predeceased him. Following the son's death, his widow gave birth to two children using his frozen sperm. The relevant section of the statute denied a child conceived after the death of the decedent from inheriting under a will. The court gave a liberal reading to the statute. The statutory provisions had been enacted before the technology existed. The court looked to the provisions of the *Uniform Parentage Act* and legislation in various states modelled on that Act. The court stated that when a person regarded as child as his or her own, then society should do likewise. The testator had established the trusts to benefit his family equally and therefore, the posthumously conceived grandchildren were included in the class for distribution.[134]

C. Law Reform Recommendations

1. CANADA

a. Ontario

[70] In 1985, the Ontario Law Reform Commission argued that provision should be made for posthumously conceived children, both in terms of establishing parentage and provision of inheritance rights. The Commission's view was that it was the child who suffered. It recommended that a mother should be able to register the child as the child of the deceased husband or partner where his sperm was used.[135] When there was a biological link, the Commission was of the view that posthumously conceived children should inherit as if they had been conceived during the father's lifetime. In order to avoid delays in administration, under a will or intestacy, the posthumously conceived child would inherit any undistributed estate at the time the child was *en*

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[134] *In re Martin B*, 841 NYS 2d 207 (NY 2007) See also: Robert Matthew Harper, "Dead Hand Problem: Why New York's Estates, Powers and Trusts Law Should Be Amended to Treat Posthumously Conceived Children as Decedents' Issue and Descendants" (2008) 21:3&4 Quinnipiac Prob LJ 267 at 279-282.

[135] Ontario Law Reform Commission, *Report on Human Artificial Reproduction and Related Matters*, v 2 (1985) at 180.

ventre or born. This would apply to the time of ascertainment of a class of beneficiaries as well.[136]

b. Manitoba Law Reform Commission

[71] The Manitoba Law Reform Commission issued a report in 2008 recommending amendment of Manitoba's intestacy and dependants' relief legislation to include posthumously conceived children. In the Commission's view, the arguments in favour of including posthumously conceived children on intestacy outweigh the arguments against their inclusion. The biological link to family is exactly the same. It is in the best interests of the child to be included. Leaving them out discriminates against them based solely on the circumstances of their birth. As a practical matter, inheritance on intestacy provides financial support to children who will almost certainly be born to a single-parent. There was no principled reason to exclude posthumously conceived children from inheriting on intestacy from other relatives through the deceased parent.[137]

[72] The Commission recommended a number of provisions to ensure that estate administration was not unnecessarily impeded. A biological link must be established between the posthumously conceived child and the deceased parent. Consent must have been given by the deceased while alive to both posthumous conception and inheritance rights for any resulting offspring. The report suggested that the child must be conceived within two years from the issue of the grant of administration. A notice requirement to interested parties should be put in place. The potential user should give notice to the administrator and interested parties that human reproductive material is available for the purpose of conceiving a posthumous child within six months of the issue of the grant of administration.[138]

[73] With respect to dependants' relief, the report proposed that posthumously conceived children should be able to apply for dependants' relief for the same reasons that they should be able to inherit on intestacy.

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[136] Ontario Law Reform Commission, *Report on Human Artificial Reproduction and Related Matters*, v 2 (1985) at 182-183.

[137] Manitoba Report at 15-16, 23.

[138] Manitoba Report at 18-24.

It is in the best interests of the child and the same safeguards should be put in place, i.e., there has to be consent from the deceased parent, notice must be given and the child must be born within a certain time period after the death of the parent. The report also recommended that an application for relief should be made within six months of the birth of the child.[139]

c. Uniform Law Conference of Canada

i. Report of the Joint ULCC-CCSO Working Group

[74] In 2009, the Joint ULCC-CCSO Working Group issued a report on parentage in the context of artificial reproduction. The report recommended that the parentage of posthumously conceived children should be recognized when the deceased parent clearly consented before death to the use of the reproductive material and the deceased parent clearly said before death whether any posthumous children were to be treated as offspring for the purposes of inheritance or other social benefits. The report suggested a time limit should be set in which steps must be taken for the child to be entitled to inheritance or benefits, subject to extension by a court or the court setting aside funds for possible future offspring.[140]

ii. Child Status Act, 2010

[75] The Uniform Law Conference of Canada approved this uniform legislation in 2010. The *Child Status Act* provides for parentage for posthumously conceived children by means of a court declaration. The relevant sections of the Act are as follows:[141]

> **Rules of parentage**
>
> **3(1)** For all purposes of the law of (*enacting jurisdiction*) a person is the child of his or her parents.
>
> (2) The following persons are the parents of a child:
>
> (a) his or her birth mother;

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[139] Manitoba Report at 25-26.

[140] ULCC Report at 14-15.

[141] Uniform Law Conference of Canada, *Child Status Act*, 2010, ss 3, 7.

(b) his or her birth mother and ...

(iv) a person declared by a court to be a parent under subsection 7(3), or...

(c) a person declared by a court under subsection 7(4), section 8 or 18 to be a parent;...

(3) Kindred relationships shall be determined according to the relationships described in this section.

(4) Any distinction between the status of a child born inside marriage and a child born outside marriage is abolished.

Declaratory order respecting parentage – posthumous conception

7(1) The following persons may apply to the court for a declaratory order that a deceased person is a parent of a posthumously conceived child:

(a) the person who was married to or in a common-law partnership with the deceased person at the time of his or her death; or

(b) the person who is claiming to be the posthumously conceived child of the deceased person.

(2) A person referred to in clause (1)(a) may apply for a declaratory order that he or she and a deceased person are the parents of a posthumously conceived child born to a surrogate.

(3) The court may grant the order sought under subsection (1) if it is satisfied that

(a) the human reproductive material of the deceased person or an embryo created with the human reproductive material of the deceased person was used in the assisted reproduction, and

(b) prior to his or her death, the deceased person consented in writing to be recognized as a parent of a child conceived posthumously and did not withdraw that consent in writing.

(4) The court may grant the order sought under subsection (2) if it is satisfied that

(a) the human reproductive material of the deceased person or an embryo created with the human

reproductive material of the deceased person was used in the assisted reproduction,

(b) prior to his or her death, the deceased person consented in writing to be recognized as a parent of a child conceived posthumously and did not withdraw that consent in writing,

(c) the applicant consented to be a parent of a child born as a result of the assisted reproduction and did not withdraw that consent prior to the child's conception, and

(d) after the birth of the child, the surrogate consented in the prescribed form

(i) to relinquish her entitlement to be a parent of the child, and

(ii) to the application.

[76] The commentary explains that section 7 is consistent with the AHRA and requires that the deceased individual gave written consent to be a parent of a posthumously conceived child.[142]

d. British Columbia – Family law reforms

[77] The British Columbia government issued a White Paper in 2010 outlining proposed changes to family law legislation. As part of the reforms, it proposed that the *Wills, Estates and Succession Act* be amended to provide for inheritance by posthumously conceived children. The recommendations of the Manitoba Law Reform Commission would be followed. A deceased person who provided human reproductive material and gave written consent to be a parent of a posthumously conceived child would be presumed to be the child's parent. If the deceased person was a parent under the legislation, the child would be an heir of that parent. Notice would have to be given to the personal representative and interested persons of the intention to have a posthumously conceived child. The posthumously conceived child must be born within two years of the date of death and must survive for five days. With respect to inheritance from someone other than a parent, it would only be after birth

[142] Uniform Law Conference of Canada, *Child Status Act*, 2010, s 7, commentary.

that the posthumously conceived child would have inheritance rights.[143] These proposals have been put into place in the recent British Columbia Act.[144]

2. COMMONWEALTH

a. Warnock Commission, United Kingdom

[78] In 1984, the Warnock Commission considered the question of succession rights for posthumously conceived children. The opinion of the Commission was that posthumous conception should be "actively discouraged." Finality in the administration of estates was essential. They recommended legislation stipulate that any child born as a result of ART who was not in *utero* at its father's death be ignored for purposes of inheritance and succession.[145] More recent discussions of the law surrounding ART in the United Kingdom have not discussed succession.[146] Recent legislation has recognized parentage for the purposes of birth registration only.[147]

b. New South Wales Law Reform Commission

[79] In 2007, the New South Wales Law Reform Commission considered whether posthumously conceived children should be provided for under model intestacy legislation. The Commission acknowledged that current provisions on *en ventre sa mère* were deficient due to the development of ART. Their view was that it would be too administratively complex to

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[143] British Columbia, Ministry of Attorney General, *White Paper on Family Relations Act Reform: Proposals for a New Family Law Act* (2010) at 33 [British Columbia White Paper]. This proposal and others in the paper have been described as "cutting edge." Cristin Schmitz, "BC Poised For Massive Family Law Overhaul" 30: 17 *The Lawyer's Weekly* (September 10, 2010).

[144] British Columbia Act. See the discussion above.

[145] UK, Department of Health and Social Security, *Report of the Committee of Inquiry into Human Fertilisation and Embryology*, (London: July 1984) (Chairman: Dame Mary Warnock DBE) at paras 10-9, 10-15, online: <http://www.hfea.gov.uk/docs/Warnock_Report_of_the_Committee_of_Inquiry_into_Human_Fertilisation_and_Embryology_1984.pdf>.

[146] UK, House of Commons Science and Technology Committee, *Human Reproductive Technologies and the Law* (5th report of session 2004-2005) v 1; UK, Department of Health, *Review of the Human Fertilisation and Embryology Act* (14 December 2006); UK, Secretary of State for Health, *Government Response to the Report from the Joint Committee on the Human Tissue and Embryos (Draft) Bill*, Cmd 7209 (October 2007).

[147] See the discussion of the UK legislation above.

grant such children any rights on succession. As a result, they recommended that posthumously conceived children be excluded. The model law should make it clear that only children *en ventre* at the date of the testator's death are included. The suggested wording was as follows: "A person is not entitled to participate in the distribution of an intestate's estate unless (a) born before the intestate's death; or (b) born after a period of gestation in the uterus that commenced before the intestate's death."[148] This recommendation is similar to that made in a 1986 report on ART.[149]

3. UNITED STATES

a. *Restatement (Third) of Property: Wills and Other Donative Transfers*

[80] The Restatement provides: [150]

> **§ 2.5**: For purposes of intestate succession by, from, or through an individual: (1) An individual is the child of his or her genetic parents, whether or not they are married to each other, except as otherwise provided in paragraph (2) or (5) or as other facts and circumstances warrant a different result.

[81] The note to this section discusses reproductive technologies and explains that the Restatement supports rethinking the idea that a posthumously conceived child cannot be an heir. The comment suggests that there should be a time limitation on posthumous births and that the circumstances should show that the deceased would have been in agreement with the child having inheritance rights. An example of a "clear case" would be artificial insemination of a widow with the deceased husband's frozen sperm.[151]

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[148] New South Wales Law Reform Commission, *Uniform Succession Laws: Intestacy*, Report 116 (2007) at 126-129, 261-262.

[149] New South Wales Law Reform Commission, *Artificial Conception: Human Artificial Insemination*, Report 49 (1986) at 12-8 - 12-9. However, the Commission recommended that paternity be recognized and that these children should be allowed to apply for dependant's relief (at 12-10).

[150] American Law Institute Report, note 123 at § 2.5.

[151] American Law Institute Report, note 123 at § 2.5(l).

b. *Uniform Parentage Act*

[82] The *Uniform Parentage Act* provides:[152]

> **Section 707. Parental Status of Deceased Individual**
>
> If an individual who consented in a record to be a parent by assisted reproduction dies before placement of eggs, sperm, or embryos, the deceased individual is not a parent of the resulting child unless the deceased spouse consented in a record that if assisted reproduction were to occur after death, the deceased individual would be a parent of the child.

c. *Uniform Probate Code*

[83] The *Uniform Probate Code* was amended in 2008 to make provision for posthumously conceived children. This recognition of the right to inheritance on intestacy by these children is important as it will influence state legislatures.[153] Under section 2-120(k):[154]

> **Section 2-120 Child Conceived by Assisted Reproduction Other than Child Born to Gestational Carrier**
>
> (k) [When Posthumously Conceived Child Treated as in Gestation] If, under this section, an individual is a parent of a child of assisted reproduction who is conceived after the individual's death, the child is treated as in gestation at the individual's death for purposes of Section 2-104(a)(2) if the child is:
>
> (1) in utero not later than 36 months after the individual's death; or
>
> (2) born not later than 45 months after the individual's death.

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[152] National Conference of Commissioners on Uniform State Laws, *Uniform Parentage Act*, § 707, comment on the section:

> Absent consent in a record, the death of an individual whose genetic material is subsequently used either in conceiving an embryo or in implanting an already existing embryo into a womb ends the potential legal parenthood of the deceased. This section is designed primarily to avoid the problems of intestate succession which could arise if the posthumous use of a person's genetic material leads to the deceased being determined to be a parent. Of course, an individual who wants to explicitly provide for such children in his or her will may do so.

online: <http://www.law.upenn.edu/bll/archives/ulc/upa/final2002.htm>.

[153] Raymond C O'Brien, "The Momentum of Posthumous Conception: A Model Act" (2008-2009) 25:2 J Contemp Health L & Pol'y 332 at 363.

[154] National Conference of Commissioners on Uniform State Laws, *Uniform Probate Code*, s 2-120(k), online: http://www.law.upenn.edu/bll/archives/ulc/upc/2008final.pdf [*Uniform Probate Code*].

[84] Section 2-104(a)(2) provides that for the purposes of intestate succession an individual in gestation is deemed to be living at the time of the intestate's death if the individual lives for 120 hours after birth.[155]

[85] The Code provides that, for other than the birth mother, an individual must have consented to ART and intended to be treated as a parent of a posthumously conceived child. The intent must be established with clear and convincing evidence.[156] The Code also provides that personal representatives can take account of the possibility of a posthumous birth in distributing an estate. The 36 month period refers to the period under which an heir can make a claim for improper distribution, that is, the later of one year after distribution or three years after death. The 45 month period is the three years plus nine months for pregnancy.[157]

d. American Bar Association

[86] The American Bar Association has recently issued a model act on assisted reproductive technologies.[158] It tracks the parentage provisions of the *Uniform Parentage Act*.

> **Section 607. Parental Status of Deceased Individual**
>
> Except as otherwise provided in the enacting jurisdiction's probate code, if an individual who consented in a record to be a parent by assisted reproduction dies before placement of eggs, sperm, or embryos, the deceased individual is not a parent of the resulting child unless the deceased spouse consented in a record that if assisted reproduction were to occur after death, the deceased individual would be a parent of the child.

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[155] *Uniform Probate Code*, note 154, s 2-104(a)(2).

[156] *Uniform Probate Code*, note 154, s 2-120(f).

[157] Raymond C O'Brien, "The Momentum of Posthumous Conception: A Model Act" (2008-2009) 25:2 J Contemp Health L & Pol'y 332 at 363.

[158] American Bar Association, *American Bar Association Model Act Governing Assisted Reproductive Technology* (February 2008)at § 607, online: <http://apps.americanbar.org/family/committees/artmodelact.pdf> at;

Raymond C O'Brien, "The Momentum of Posthumous Conception: A Model Act" (2008-2009) 25:2 J Contemp Health L & Pol'y 332 at 369.

4. SUMMARY

[87] If parentage has been considered, law reform agencies have been unanimous that posthumously conceived children should be recognized under the law as the child of their deceased parent.[159] With respect to succession, Canadian and US law reform recommendations have been in favour of granting inheritance rights. Consent on the part of the deceased to be the parent of a posthumously conceived child is recommended with respect to both parentage and inheritance. Most agencies have recommended that a posthumously conceived child must be born within a certain time frame following the death.[160] The suggested time periods have ranged from two years to 45 months.[161]

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[159] Several of the law reform reports outlined above did not discuss parentage. See the discussion of the recommendations made by the Warnock Commission, New South Wales and Manitoba outlined above.

[160] The Ontario Law Reform Commission suggested that the posthumously conceived child should only inherit any undistributed estate at the time of its birth. See the discussion above.

[161] The Manitoba Law Reform Commission suggested that the child must be born within two years of the grant of administration. The *Uniform Probate Code* recommends that birth must take place within 45 months of the death, including a period of gestation. See the discussion above.

CHAPTER 4

Options for Reform

A. Policy Concerns

[88] The decision as to whether posthumously conceived children should have inheritance rights requires a consideration of the interests of the child and the interests of the state and others. Various arguments can be made for and against giving posthumously conceived children inheritance rights. The critical point is that legislative reform, one way or another, is desirable. Unless legislative reforms are put in place, the issue of these children is bound to arise in the courts and the decisions are unlikely to be consistent.[162]

[89] Should the decision whether or not to grant posthumously conceived children inheritance rights be based on the presumed intention of the deceased? The traditional view is that the aim of succession law is to give effect to the wishes of the testator. At the heart of intestacy provisions is the idea that society has decided what the average person would have wanted in respect of the transmission of property.

[90] Modern commentary on the goals of inheritance law has tended to adopt a family law stance, focusing on the needs of the surviving family members. Questions about the relationship of parent and child are looked at from the point of view of the best interests of the child.[163] Commentators have posited that intestacy legislation should promote fairness in distribution and family harmony.[164] Many of the current arguments favouring inheritance rights for posthumously conceived children are based on the best interests of the child.

[91] In making recommendations for parentage in the context of assisted reproduction, the Joint ULCC-CCSO Working Group adopted a

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[162] Manitoba Report at 15.

[163] Lee-ford Tritt, "Sperms and Estates: An Unadulterated Functionally Based Approach to Parent-Child Property Succession" (2009) 62 SMU L Rev 367 at 414-415.

[164] Lee-ford Tritt, "Sperms and Estates: An Unadulterated Functionally Based Approach to Parent-Child Property Succession" (2009) 62:1 SMU L Rev 367 at 380-381; Adam J Hirsch, "Default Rules in Inheritance Law: A Problem in Search of its Context" (2004-2005) 73:3 Fordham L Rev 1031 at 1035-36.

number of guiding principles which are relevant to the discussion of whether or not posthumously conceived children should have inheritance rights. The principles are:[165]

- "respect Canada's obligation under the *UN Convention on the Rights of the Child*, including:
  - protecting the child from discrimination
  - recognizing the best interests of the child is a primary consideration
  - ensuring the status of the parent/child relationship is protected from birth;" ...
- "promote equality of treatment of children regardless of the means of their conception;" ...
- "promote clarity and certainty of parent/child status at the earliest possible time in the child's life." [footnotes omitted]

[92] The major rationale against giving posthumously conceived children inheritance rights is that the orderly administration of estates will be impeded. This is the view held by the Warnock Commission in England and the New South Wales Law Reform Commission.[166] The state and beneficiaries have an interest in ensuring that estates are distributed in a timely manner.[167] Expeditious handling of estates provides for certainty and finality.[168] Allowing posthumously children to inherit could tie-up estates for prolonged periods of time. A portion of an estate might be set aside for the benefit of a child who might never be born. There could be court challenges in an otherwise straightforward situation.[169] There is also the concern that beneficiaries will be impacted as existing

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[165] ULCC Report at 7-8.

[166] UK, Department of Health and Social Security, *Report of the Committee of Inquiry into Human Fertilisation and Embryology*, (London: July 1984) (Chairman: Dame Mary Warnock DBE) at 10-9, 10-15; New South Wales Law Reform Commission, *Uniform Succession Laws: Intestacy*, Report 116 (2007) at 126-129.

[167] Manitoba Report at 15.

[168] Ronald Chester, "Posthumously Conceived Heirs Under A Revised Uniform Probate Code" (2003-2004) 38:4 Real Prop Prob & Tr J 727 at 736.

[169] Stacey Sutton, "The Real Sexual Revolution: Posthumously Conceived Children" (1999) 73:3 St John's L Rev 857 at 918.

children and other beneficiaries will receive less than their expected inheritance.[170]

[93] An additional argument against giving posthumously conceived children inheritance rights is that the human connection with the deceased parent is not sufficient. Succession law is based on human relationships, mostly relationships with family members. It may be argued that the posthumously conceived child has no connection with the deceased parent other than a genetic one.

[94] Another basis for denying posthumously conceived children inheritance rights is that there may be fraudulent claims for inheritance. The availability of DNA testing should alleviate this concern.

[95] With respect to the case in favour of giving the posthumously conceived child inheritance rights, it is undeniable that succession law has been concerned with providing for unborn children for many centuries.[171] The creation of the legal fiction *en ventre sa mère* allowed children in the womb at the time of a testator's death to inherit as if they had been born in the lifetime of the testator whether under a will or on intestacy.[172]

[96] Pre-termitted child statutes in the US are also concerned with making provision for after-born children.[173] These statutes give a share to an omitted child under a will in certain circumstances. It is presumed that the child was overlooked and that the testator would want to provide for the child. One author states that a "straightforward application" of this type of statute should include posthumously conceived children.[174]

[97] Why is it assumed that a person would intend to provide for a child in the womb at the time of death and not a child conceived through

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[170] Knaplund 2008 at 412.

[171] The roots of the concept can be traced back to Roman legal writers. Roderick R M Paisley, "The Succession Rights of the Unborn Child" (2006) 10:1 Edinburgh L Rev 28 at 29-30, 33.

[172] The case of *Reeve v Long* in 1694 allowed a child in the womb at the time of the father's death to inherit under a will. 91 ER 202 (1694) In 1699, the *Statute of 10 & 11 WM. III Cap. 16* was enacted as "An act to enable posthumous children to take estates as if born in their father's lifetime." Alison Reppy & Leslie J Tompkins, *Historical and Statutory Background of The Law of Wills: Descent and Distribution, Probate and Administration* (Chicago: Callaghan and Company, 1928) at 77, 231.

[173] See the discussion of the US law above.

[174] James E Bailey, "An Analytical Framework for Resolving the Issues Raised by the Interaction between Reproductive Technology and the Law of Inheritance" (1997-1998) 47:4 DePaul L Rev 743 at 793.

ART after death? In the Tasmanian case, *In the Matter of the Estate of the Late K*,[175] the court articulated persuasive policy arguments why a posthumously conceived child should be given inheritance rights on intestacy. A married couple had been part of an *in vitro* program and had given birth to one child. They had planned to have another child using the remaining frozen embryos, but the husband died before this could take place. The question for the court was whether the two frozen embryos were "issue" under intestacy and, if so, were they living at the date of death? Alternatively, would they become children of the deceased when they were born alive?

[98] The court found that a foetus has contingent interests which vest when it is born alive. The judge questioned whether, as a matter of policy, the law should distinguish between a child *en ventre sa mère* and his or her sibling, who was at the time a frozen embryo. Should the application of the fiction be withheld because medicine and technology have advanced? The court held that the posthumous *in vitro* biological child was identical to a child *en ventre sa mère*, except with respect to the date of implantation. Logically, the legal principles applicable to a child *en ventre sa mère* should be applied to the posthumous *in vitro* child. The court concluded that the *in vitro* child born subsequent to the death of the father had a right of inheritance under intestacy law.[176]

[99] Arguably, the most important rationale for giving posthumously conceived children inheritance rights centres on the equal treatment of all children. The law should provide the same benefits to all children.[177] Without legislative provision for inheritance, these children are in a similar historical position as the child born outside marriage who did not have a right to inheritance from the biological father or paternal relatives.[178] Canada is obligated under the United Nations *Convention on*

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[175] *In the Matter of the Estate of the Late K and In the Matter of the Administration and Probate Act 1935* [1996] TASSC 24 (22 April 1996).

[176] *In the Matter of the Estate of the Late K and In the Matter of the Administration and Probate Act 1935* [1996] TASSC 24 (22 April 1996) at paras 20, 29, 31.

[177] Laurence C Nolan, "Posthumous Conception: A Private or Public Matter?" (1997) 11:1 BYU J Pub L 1 at 28, 30; Manitoba Report at 16.

[178] Rosalind Atherton, "En Ventre Sa Frigidaire: Posthumous Children in the Succession Context" (1999) 19:2 Legal Studies 139 at 161; Alberta Report at 171-176. In Alberta, it was not until 1991 that the *Intestate Succession Act* was amended to abolish any relevance of legitimacy with respect to intestate succession. *Family and Domestic Statutes Amendment Act 1991*, SA 1991, c 11, s 3. With

Continued

the Rights of the Child to act in the best interests of a child and to not discriminate against a child.[179]

[100] It may be argued that the guiding principle should be the welfare of the child.[180] It seems clear that the best interest of a child is to be considered as an heir either under intestacy or a will. Although they are conceived differently from most children, they are still children and should be entitled to the same protections and rights as children conceived before death.[181]

[101] An additional policy ground in favour of granting posthumously conceived children succession rights is avoiding the necessity for the state to support these children. A posthumously conceived child will most likely be born into a one parent family. This situation often results in financial need. There is an obvious interest on the part of the state and taxpayers to avoid state support of children. Allowing children to inherit may diminish this possibility.[182]

[102] A further basis for giving posthumously conceived children succession rights is the promotion of family cohesiveness. One of the goals of good succession law could be promoting the family unit to ensure that children are properly cared for. This view encompasses the reality that the modern family takes many forms not associated with traditional heterosexual marriage and reproduction.

[103] When one considers the arguments commonly made in favour of giving posthumously conceived children inheritance rights, there is a striking parallel with the arguments made for many years in favour of abolishing the status of illegitimacy. Like the posthumously conceived

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respect to a will, the WSA abolishes the relevance of legitimacy with respect to wills by tying the definition of parent and child to the FLA. WSA, s 1(3).

[179] United Nations, *Convention on the Rights of the Child* (GA Res 44/25, November 20, 1989), Arts 2, 3. Canada ratified the *Convention* on December 13, 1991. Child is defined in Art 1 as "every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier."

[180] Laurence C Nolan, "Critiquing Society's Response to the Needs of Posthumously Conceived Children" (2003) 82:4 Or L Rev 1067 at 1097.

[181] *Woodward v Commissioner of Social* Security, 760 NE 2d 257, 17 ALR 6th 851 at 863 (Mass 2002); VanCannon at 359.

[182] Brianne M Star, "A Matter of Life and Death: Posthumous Conception" (2004) 64:3 La L Rev 613 at 624-625; Michael K Elliott, "Tales of Parenthood from the Crypt: The Predicament of the Posthumously Conceived Child" (2004-2005) 39:1 Real Prop Prob & Tr J 47 at 66.

child, the child born outside marriage had no control over the circumstances of its birth. The child was discriminated against due to the actions of its parents.[183]

[104] Underlying all the policy debate around inheritance rights for posthumously conceived children is a concern with consent on the part of the deceased parent. Most law reform recommendations have made consent by the deceased while alive to be the parent of a posthumously conceived child part of the requirements.[184]

[105] Is it reasonable to require consent to be a parent of a posthumously conceived child? In the circumstances which result in a posthumously conceived child, the parties had previously taken steps through ART to conceive a child, either at the moment or in the future, and the death of one partner intervenes. In Canada, consent will have been given to the ART process and, with respect to posthumous conception, consent to the use of the reproductive material or embryo after death. Is that consent enough to presume an intention to be a parent of a posthumously conceived child?

B. Clarifying Parentage

ISSUE 1

Should parentage for posthumously conceived children be clarified under the *Family Law Act*?

[106] It seems unlikely that parentage can be established under the FLA in respect of the deceased parent. In general, the posthumously conceived child must have the status of a child of the deceased before any rights to succession can be exercised.

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[183] See Alberta Report at 171-206.

[184] See for example, ULCC Report at 14-15; British Columbia White Paper at 33; US, *Uniform Probate Code*, s 2-120(f), online at: <http://www.law.upenn.edu/bll/archives/ulc/upc/2008am_approved.pdf>. See also the section on law reform recommendations above. The FLA requires consent to be a parent in certain cases, but by defining conception as the date of the procedure which resulted in implantation effectively precludes consent to being a parent after death. See the discussion of legal parentage under the Act above.

[107] The *Uniform Child Status Act* adopted by the Uniform Law Conference of Canada in 2010 allows the spouse, partner or child of the deceased to apply for a court declaration of parentage. The deceased must have consented while alive to be the parent of a posthumously conceived child.[185]

[108] It may be questioned whether this model should be followed. Is a court declaration necessary? Should not parentage follow as an extension of the concept of *en ventre sa mère*? Alternatively, should the consent given by the deceased during life to ART be sufficient with an ability to apply to the court in a disputed case? The British Columbia White Paper suggests that if the deceased donated reproductive material and consented to be a parent of a posthumous child, there should be a presumption of parentage and this has been followed in the British Columbia Act.[186]

C. Inheritance under Intestacy

1. INHERITANCE FROM A PARENT

ISSUE 2

Should the posthumously conceived child inherit from or through the deceased parent on intestacy?

[109] The discussion below sets out various policy alternatives for inheritance by posthumously conceived children on intestacy. If the choice is made to allow inheritance, some possible requirements are proposed.

Option 1: Posthumously conceived children should not inherit on intestacy from the parent unless the child is in the womb at the time of the parent's death.

[110] This option represents the current law in Alberta. Retaining this option would place certainty and efficiency in estate administration as the overriding value. This option has been advocated by some law reform

[185] Uniform Law Conference of Canada, *Child Status Act*, 2010, s 7.

[186] British Columbia White Paper at 33; British Columbia Act, s 28.

agencies including, most recently, the New South Wales Law Reform Commission.[187]

Option 2: The posthumously conceived child should inherit on intestacy from the parent if the child is born within a defined time period.

[111] What would be the practical effect of allowing a posthumously conceived child to inherit from the intestate deceased parent? Under the WSA, a surviving spouse or adult interdependent partner will take the whole of the estate if there are no descendants of the deceased or where all the descendants are also descendants of the surviving spouse or adult interdependent partner. If any of the descendants of the deceased are not descendants of the surviving spouse, then the surviving spouse or partner takes the greater of either the prescribed amount or 50% of the net value of the estate. The remaining portion of the estate is distributed in equal shares among the children of the deceased and the descendants of any deceased children. Thus, under these provisions, the posthumously conceived child would only receive a share of the estate where there are children from a previous relationship on the part of the deceased. This is a very common situation today.[188]

[112] There are also provisions for distribution if there is no surviving spouse or partner.[189] At present, given the provisions of the AHRA which provide for reproductive use after death by a surviving partner or spouse only, this last provision is not applicable.[190]

[113] A possible time frame is that the posthumously conceived child would inherit from the deceased parent any undistributed estate when the child is in the womb or born alive. This option was suggested by the Ontario Law Reform Commission.[191] It would avoid any delay in estate administration. The drawbacks to this approach would be that it could lead to a race to have a posthumously conceived child for financial gain or

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[187] New South Wales Law Reform Commission, *Uniform Succession Laws: Intestacy*, Report 116 (April 2007) at 126-129, 261-262.

[188] WSA, ss 58-70.

[189] WSA, ss 65, 67.

[190] AHRA, s 8.

[191] Ontario Law Reform Commission, *Report on Human Artificial Reproduction and Related Matters*, v 2 (1985) at 182-183.

alternatively, a race to distribute the estate as quickly as possible to avoid the child taking a share.

[114] Another option is that the child should inherit from the deceased parent if the posthumously conceived child is born within a defined time period after the death. The object of this type of requirement is to ensure that estates are not in limbo for extended periods of time while waiting for a posthumously conceived child to be born. In California, the child must be in the womb within two years of the death. Whereas, in Louisiana, the time limit is three years from the date of death.[192] The British Columbia White Paper recommends that the child must be born within two years of the date of death.[193] This alternative has been followed in the British Columbia Act.[194] Alternatively, the Manitoba Law Reform Commission proposed that the child must be must be conceived within two years from the issue of the grant of administration.[195]

[115] What other provisions might be required for inheritance on intestacy? Proof of a genetic link is desirable. If fraud is suspected, proof should not be difficult to establish with the availability of DNA testing. Another possible requirement would be consent to parentage and/or inheritance. It would require that consent to be a parent of a posthumously conceived child for purposes of inheritance had been given. The various policy issues with respect to such a requirement have been discussed above.[196]

2. INHERITANCE FROM ANOTHER RELATIVE

[116] One option is to only allow posthumously conceived children to inherit from other relatives if they have been born alive at the time of the relative's death. This is the alternative proposed by the British Columbia

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[192] Browne C Lewis, "Dead Men Reproducing: Responding to the Existence of Afterdeath Children" (2008-2009) 16:1 Geo Mason L Rev 403 at 430.

[193] British Columbia White Paper at 33.

[194] British Columbia Act, s 467.

[195] Manitoba Report at 24. It may be preferable to calculate the time limit from death rather than the date of obtaining the grant of administration. The length of time it takes personal representatives to obtain a grant varies greatly.

[196] A consent requirement is proposed in the Manitoba Report at 24 and in the British Columbia White Paper at 33. It is present in British Columbia Act, s 467.

White Paper and placed in the British Columbia Act.[197] The advantage of this option would be to avoid the delays and uncertainty in administration of the estate except for the estate of the deceased parent. The Manitoba Law Reform Commission saw no principled reason why inheritance by these children on intestacy should be any different if the deceased is a relative rather than a parent.[198]

D. Inheritance under a Will

ISSUE 3

Should the posthumously conceived child be able to inherit under a will?

1. INHERITANCE FROM A PARENT

Option 1: A child will not inherit from a parent unless the child is in the womb at the time of the parent's death.

[117] This is the case in some jurisdictions at present.[199] This option would place certainty and finality in estate administration as the overriding value.

Option 2: A child may inherit from the deceased parent where the will has been drafted with an intention to benefit a posthumously conceived child.

[118] This option would retain the current law in Alberta under the WSA. For a posthumously conceived child to inherit there must be a contrary intention to benefit a posthumous child on the part of the testator as required by the WSA. The legal hurdles of establishing an intention to benefit the posthumously conceived child would remain.[200] Administration of the estate might be delayed as the estate remained open to allow for the birth of the child. The potential impact of the class closing rules and the rule against perpetuities would have to be considered. Contravention of the rule against perpetuities would likely result in the

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[197] British Columbia White Paper at 33; British Columbia Act, s 467.

[198] Manitoba Report at 23-24.

[199] See the discussion of the UK legislation above.

[200] See the discussion on establishing testamentary intent above.

"wait and see" provisions of the *Perpetuities Act* being applied and delay in finalizing the estate. These concerns could be dealt with through appropriate drafting of the will.

Option 3: It is presumed that a parent will want to benefit a posthumously conceived child and a child may inherit from the deceased parent if the child is born within a certain time period after the death.

[119] This option would require a provision in the WSA allowing a child to inherit if born within a certain time period after the death of the testator. The time period could be the same as the time limit chosen for intestacy, if applicable. It would eliminate some of the uncertainty and potential delays in administration. Presumably, it would remove much of the impact of the class closing rules and the rule against perpetuities.

2. INHERITANCE FROM OTHER RELATIVES

[120] As discussed in the section on intestacy, there are basically two options here. Either the posthumously conceived child inherits from other relatives in the same manner as inheritance from the deceased parent is structured or the legislation could stipulate that the child would only inherit if born alive before the death of the relative.

E. Entitlement to Family Maintenance and Support

ISSUE 4

Should the posthumously conceived child be eligible for family maintenance and support?

[121] At present, a posthumously conceived child will not be eligible to apply for family maintenance and support.[201] The Manitoba Law Reform Commission suggested that the ability to apply for support from the estate should follow from the ability to inherit on intestacy.[202]

[201] See the discussion above.

[202] Manitoba Report at 25-26.

APPENDIX

Background Information on Assisted Reproductive Technologies

Artificial Insemination

This procedure consists of the introduction of fresh or previously frozen semen from a husband, partner, or anonymous donor into the woman's uterus or vagina. This procedure mimics the natural process of reproduction. About 40% of women undergoing this procedure have a child as a result and it requires an average of seven attempts to achieve a pregnancy.[203] It is often used to treat male infertility.[204]

***In vitro* Fertilization**

Under this procedure, the woman's eggs are harvested and fertilized with sperm in a laboratory. The embryos are implanted in the uterus of the woman.[205] The various procedures include: ovarian stimulation; treatment of gametes *in vitro* including the use of intracytoplasmic sperm injection; growing embryos for varying periods of time before implantation; and freezing embryos for future use through cryopreservation. On average, live birth rates from a single cycle ranges from 20% to 40%.[206] A recent study found cumulative live birth rates of 51 to 72% over a course of six *in vitro* fertilization cycles for women of all ages.[207] In Canada in 2008, the live birth rate was 29% per cycle started.[208] Whether or not ART treatment results in a live birth is very dependent on the age of the woman and some clinics in Canada have pregnancy rates of

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[203] Emily McAllister, "Defining the Parent-Child Relationship in an Age of Reproductive Technology: Implications for Inheritance" (1994-1995) 29:1 Real Prop Prob & Tr J 55 at 59.

[204] Erica Howard-Potter, "Beyond Our Conception: A Look at Children Born Posthumously Through Reproductive Technology and New York Intestacy Law" (2005-2006) 14 Buff Women's L J 23 at 26.

[205] J K Mason, *Medico-Legal Aspects of Reproduction and Parenthood* (Aldershot, England: Dartmouth Publishing, 1998) at 229.

[206] Georgina M Chambers *et al*, "The economic impact of assisted reproductive technology: A review of selected developed countries" (2009) 91:6 Fertility and Sterility 2281 at 2281.

[207] Beth A Malaria, Michele R Hacker & Alan S Penzias, "Cumulative Live-Birth Rates after *In Vitro* Fertilization" (2009) 360:3 New England Journal of Medicine 236 at 236.

[208] Canadian Fertility and Andrology Society, "Canadian ART Register Annual Report: 2008" online: <www.cfas.ca>.

over 60% with younger women.[209] Multiple births are common as more than one embryo is often placed. This increases the chances of complications and miscarriage.[210] There is a recent trend to the use of single embryo transfers in younger women.[211]

GIFT and ZIFT

In Gamete Intrafallopian Transfer [GIFT], the eggs and sperm are put into the fallopian tubes and fertilization occurs in the natural environment.[212] This procedure is not used very often because of the greater cost and surgical risk.[213] In Zygote Intrafallopian Transfer [ZIFT], *in vitro* fertilization has already taken place, but a zygote is injected into the fallopian tubes.[214] This is a more expensive procedure than *in vitro* fertilization.[215]

Surrogacy

This is where a gestational mother carries the child in the place of the woman who plans to be the parent. Surrogacy is only rarely used for *in vitro* fertilization or frozen embryo transfers. In 2005 in Canada, only 1.1% of such births were born to surrogate mothers. There was a genetic link between the child and at least one of the intended parents in all the births.[216]

Cryopreservation

This is the method of freezing reproductive material for future use and is the method which makes posthumous conception possible. Sperm and embryos can be frozen for many years. When more eggs are

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[209] See Genesis Fertility Clinic, Vancouver, BC, online: <http://genesis-fertility.com/general-information/stats>; Regional Fertility Program, Calgary, AB, online: <http://www.regionalfertilityprogram.ca/success-4.php>.

[210] VanCannon at 340.

[211] See Genesis Fertility Clinic, Vancouver, BC, online: <http://genesis-fertility.com>.

[212] Beth A Malizia, Michele R Hacker & Alan S Penzias, "Cumulative Live-Birth Rates After *In Vitro* Fertilization" (2009) 360:3 New England Journal of Medicine 236 at 247.

[213] VanCannon at 340-341.

[214] Manitoba Report at 3.

[215] VanCannon at 341.

[216] ULCC Report at 3.

harvested than are needed for an ART cycle, the eggs, zygotes, or embryos can be frozen and used at a later date.[217] The first live birth using frozen embryos occurred in 1983 and the use of frozen embryos is widespread today.[218] In March 2009, a baby girl was born using sperm which had been frozen 21 years earlier. There have been cases of embryos being implanted after being frozen for a decade.[219]

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[217] Julie E Goodwin, "Not All Children are Created Equal: A Proposal to Address Equal Protection Inheritance Rights of Posthumously Conceived Children" (2004-2005) 4:2 Conn Pub Int LJ 234 at 237.

[218] Julie E Goodwin, "Not All Children are Created Equal: A Proposal to Address Equal Protection Inheritance Rights of Posthumously Conceived Children" (2004-2005) 4:2 Conn Public Int LJ 234 at 238 at n 18.

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